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No. 85-1182

In the

Supreme Court of the United States

OCTOBER TERM, 1985

HUMBLE EXPLORATION COMPANY, INC., et al.,
Petitioners,

v.

JANE H. BROWNING, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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February 14, 1986

ISSUE PRESENTED

Does the due process clause of the Fourteenth Amendment prohibit the courts of Texas from dismissing a pending appeal where it has been established that the appellant has taken action which, as a matter of state law, is inconsistent with the further prosecution of the appeal?

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Jane H. Browning, et al.,[1] respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the judgment of the Texas Court of Appeals for the Fifth Supreme Judicial District in this case. That court's opinions in this case are reported at 690 S.W.2d 321 and 677 S.W.2d 111.

JURISDICTION

The Court should decline to accept jurisdiction to review the judgment of the Texas court of appeals because there

[1]The Respondents are Jane H. Browning, Individually, and as Co-Independent Executrix of the Estate of William W. Browning, Jr., Michael G. Starnes, Individually, and as Co-Independent Executor of the Estate of William W. Browning, Jr., and as Co-Trustee of the Browning Children Trusts, Catherine Agnes Land Starnes, Katherine Louise Browning Cook, Averille Adams Browning Dawson, William Web Browning, III, Winifred Fallon Browning Vaughn, and Robert Holland Browning.

is an independent and adequate state ground upon which its judgment is based. *See, Board of Supervisors of Fairfax County, Virginia, v. Allman*, 423 U.S. 940 (1975). This matter will be discussed more fully under Reasons for Denying the Writ, *infra*.

STATEMENT OF THE CASE

Petitioners seek a review of the Texas court of appeals' dismissal of their appeal for abuse of the Texas judicial system. Respondents, as plaintiffs, initiated this suit against the Petitioners in September of 1979, originally in the 193rd Judicial District Court of Dallas County, Texas. The suit alleged that Petitioner Pat S. Holloway ("Holloway"), while acting as family attorney for the Browning family and as an express trustee for the Browning children, had defrauded the late William W. Browning of Mr. Browning's ownership in Humble Exploration Company, Inc. ("Humble"), had breached fiduciary duties owed to the Browning family in various capacities, and had converted and misappropriated with malice corporate and trust assets to his own use. The suit sought actual and punitive damages and the imposition of a constructive trust, an equitable remedy under Texas law. As will be discussed *infra*, the jury found favorably to the Respondents on the ultimate fact issues.

On November 19, 1979, Respondents Holloway and Humble filed voluntary Chapter 11 bankruptcy petitions and immediately removed the 1979 case to the bankruptcy court. Holloway subsequently stated that:

> . . . [the bankruptcy] filing was a technical legal maneuver made only for the purpose of removing to the federal courts [the] lawsuit. . . .

> . . . [T]hat because of the peculiar and unusual relationship between the attorneys for [Respondents] and the state district judge where the suit was brought [Judge Hugh Snodgrass], the company's attorneys believed that a large money judgment was about to be rendered against the company without any trial or hearing of any kind on the merits of the alleged claim and the only legal way to get the case out of that judge's court was to file in the federal court under Chapter 11. (Dx.1 Settlement Hearing Statement of Facts, 487-489).

Pursuant to a subsequent agreement of the parties, the bankruptcy court remanded the case to the state court but retained authority to enforce or effectuate any resulting judgment. The agreement provided that the parties would request the presiding administrative judge to assign a retired or visiting judge to hear the cause. It also provided that the parties had full rights of appeal of the judgment in the trial court, and that upon entry of a judgment:

> The Browning Interests and/or Debtor will comply with all necessary and applicable state laws during appeal subject to [provisions detailing specific methods of posting supersedeas security depending on the possible results of the judgment].

Per the agreement, the parties requested the assignment of a retired judge to hear the case.[2] That judge granted a summary judgment for Petitioners on their defensive claim that an enforceable settlement had been reached before they

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[2]The Fifth Circuit has held that this action satisfied the provisions of the agreement for the remand. *Browning v. Navarro*, 743 F.2d. 1069 (5th Cir. 1984).

filed bankruptcy. The summary judgment was reversed on appeal and remanded for trial.[3] While a trial on the merits in this case was pending, a dispute arose between Petitioners and other working interest owners in oil and gas wells operated by Humble. When the other owners sought to take their share of the production in kind, Holloway shut-in some 151 producing oil and gas wells. The other working interest owners then filed a receivership suit in the 162nd Judicial District Court of Dallas, County, Texas, and Respondents were named as defendants due to their claims to the assets of Humble and Holloway. The judge of the 162nd district court, Judge Dee Brown Walker, appointed a temporary receiver. The receiver moved, pursuant to a mandatory Texas statute, to transfer this suit to the court in which the receivership was pending. By agreement of the sitting judges of both district courts, this case was transferred to the 162nd district court. After Judge Walker ruled against Respondents following three weeks of hearings in the receivership case and set this case for trial in early July, Petitioners filed a motion to recuse Judge Walker in the then consolidated proceedings, alleging in their motion that his impartiality might be questioned.[4] Contrary to Petitioners' statements in the petition for certiorari, their motion to recuse did not raise the issue of whether under the agreement in the bankruptcy court Judge Walker should not have heard the case because he was not a retired nor visiting judge.

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[3]*Browning v. Holloway*, 620 S.W.2d. 611 (Tex. Civ. App. — Dallas), writ ref'd n.r.e. per curiam, 626 S.W.2d. 485 (Tex. 1981). On remand, a second retired judge directed a verdict against Petitioners when they failed to prove that they had an enforceable settlement.

[4]Petitioners did not allege, as they do before this Court, that Judge Walker was corrupt. The motion to recuse and the supplemental motion to recuse are attached in the Appendix. (Appendix 4 at A-50 and 5 at A-55).

Judge Morris Rolston, a visiting judge appointed by the presiding administrative judge, conducted a two-day hearing of all the evidence Petitioners wished to present to support their motion to recuse. After hearing the evidence, Judge Rolston denied the motion to recuse Judge Walker.

Thereafter, the parties proceeded to a six and one-half week trial, which concluded with multiple jury findings adverse to Petitioners.[5] The jury found that Petitioners' conduct damaged Respondents in the amount of $70,000,000.00 and awarded an additional $2,000,000.00 punitive damages against Humble. Based upon the jury's verdict and its own additional findings, the trial court entered a judgment granting the Respondents a constructive trust over substantially all of the assets of Petitioners and damages totalling $72,000,000.00. Petitioners appealed from

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[5]Petitioners affirmatively misstate both the jury's findings and the legal effects of those findings under Texas law. Footnote 1 at page 3 of the Petition states that Judge Walker disregarded jury findings that Holloway owned "100% of the stock of Petitioners" and that Respondents' "... damage claims were barred by limitations . . . ." In special issues 2 and 9 the jury found that Holloway violated his fiduciary duties to Browning by acquiring shares of stock in Humble for his own account, and in special issues 12 and 13 found that Holloway defrauded Browning in connection with the acquisition of the stock in question. In special issue 15 the jury found that Pat Holloway and others entered into a conspiracy to defraud the Plaintiff's of their rights as shareholders in the company with malice. The only affirmative findings on limitations favorable to the Petitioners were in special issue 87 (4a & b), which related solely to special issue 12 and to no other theory of recovery. Thus, the jury did not find that Respondents' damage claims were barred by limitations. Contrary to Petitioners' statement, there was no jury finding that Pat Holloway owned any stock in Humble or Sterling Pipeline Company, Inc. Apparently, the Petitioners assert that the jury's failure to find affirmatively for a party on each theory of recovery on which he has the burden of proof is equivalent to a jury finding in favor of his adversary. Stated differently, Petitioners apparently contend that the jury's negative answers to certain special issues is an affirmative finding of the opposite fact. This simply is not the law in Texas. *C. & R. Transport, Inc. v. Campbell*, 406 S.W.2d 191 (Tex. 1966).

the judgment but did not post any supersedeas bond or security.

Because the agreement which required a supersedeas bond was not complied with, Respondents requested the Petitioners and the newly appointed bankruptcy trustee, Don Navarro,[6] to voluntarily turn over the property belonging to Respondents under the adjudged constructive trust. When the request was rejected, Respondents filed a turnover suit in the United States district court, under its bankruptcy jurisdiction, as required by the agreement, to obtain possession of their property during the pendency of the state appeal. In the turnover suit, Petitioners filed a declaratory judgment proceeding as a counterclaim, asking the United States district court to hold that the remand from the bankruptcy court was not effective, that the state courts lacked jurisdiction of the case, and, therefore, the resulting judgment before Judge Walker was void because Judge Walker was neither a retired nor visiting judge.[7] Petitioner's countercliam was but the first in a litany of collateral attacks by Holloway or his family on the validity of the judgment in this case, including a civil rights case[8], a RICO

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[6]After the jury verdict, Holloway voluntarily converted his personal bankruptcy from a Chapter 11 to a Chapter 7 proceeding, and Navarro was appointed as the trustee of his bankruptcy estate. By agreement of the parties, Navarro also was appointed the trustee over the Estate of Humble.

[7]Again Petitioners misstate the record in repeatedly referring to their position in the turnover suit as merely defensive. The filing of a counterclaim is an affirmative, not defensive action.

[8]Even prior to filing his notice of appeal in this case, Holloway filed on behalf of himself and the other Petitioners, a civil rights suit in the United States district court alleging that Petitioners were denied due process in this case by a conspiracy between Respondents, their counsel, the now "corrupt" state judge and numerous third parties to rig the trial, asking the district court to declare the judgment in this case void and enjoin its enforcement. On March 28, 1985, the district court granted

case[9], multiple collateral state attacks[10], and original pro-

summary judgment for Respondents, holding:

> Plaintiffs have not, after years of discovery, produced sufficient evidence of conspiratorial agreement or conduct by the Browning Interests. [Appendix 1 at A-3].

Thereafter, on April 18, 1985, the district court granted summary judgment for all the defendants. Holloway's appeal from the summary judgment is currently pending before the Fifth Circuit. In a separate appeal, the Fifth Circuit has already held that Judge Walker has judicial immunity. *Holloway v. Walker*, 765 F.2d 517 (5th Cir.), *cert. denied* — U.S. —, 106 S.Ct. 605 (1985).

[9]In May, 1984, Holloway, appearing as an attorney, purportedly on behalf of his daughter and various owners of royalty interests in wells operated by Humble, filed in the United States district court a RICO action against the persons who were defendants in the civil rights case. As an attorney in that case, Holloway made the same conspiracy allegations and claimed the defendants had corrupted the 162nd District Court and asked the court to declare the judgment in this case void and enjoin its enforcement. Defendants' interrogatories were answered on the basis that the plaintiffs had no personal knowledge of the allegations, the knowledge was that of their attorney, Holloway, and his knowledge was privileged as work product. The RICO suit was dismissed with prejudice pursuant to Fed.R.Civ.P. 41(b) in July, 1985.

[10]After receiving adverse rulings in the spring of 1985 in the civil rights case, the turnover suit and this case, Holloway filed two suits in June and July of 1985 in a Lee County, Texas, district court collaterally attacking the judgment in this case. The suits were practically identical except for a variation of parties. Holloway, members of his immediate family, former colleagues of Holloway, and purportedly the other Petitioners, were plaintiffs in the first Lee County suit. Holloway filed the second suit as the attorney for members of his immediate family. Both suits essentially repeated the allegations in the civil rights suit, in which summary judgment had already been rendered against Petitioners, and added numerous other allegations. Both suits asked the Lee County district court to declare the judgment in this case void, enjoin its enforcement and enjoin the Respondents from complying with the United States district court's subsequent turnover orders in the turnover suit. The Lee County court announced that it would grant a temporary injunction prohibiting the Respondents from receiving any property from the bankruptcy trustee, who in 1985 had been ordered to turn over property to the Respondents. The Lee County court did not sign such an injunction but instead entered an order declaring the judgment in this case void. The Texas Supreme Court stayed the Lee County court's order and subsequently granted a conditional mandamus directing the judge of the Lee County court to vacate his order. *Browning v. Placke*, 698 S.W.2d 362 (Tex. 1985). These Lee County cases, which were consolidated, were subsequently dismissed for lack of jurisdiction on January 10, 1986.

ceedings in the Fifth Circuit.[11]

In December, 1983, the United States district court held that Petitioners were entitled to summary judgment because Judge Walker was not a retired or visiting judge, and the resulting judgment was, therefore, void. In January, 1984, the United States district court signed a judgment for Petitioners permanently enjoining the Respondents from attempting to enforce their judgment in this case, raising doubts as to Respondents' authorization to proceed in the state appeal. Respondents appealed the United States district court's judgment to the Fifth Circuit and obtained an order from the Fifth Circuit permitting them to proceed in the state court appeal.

Respondents then filed a motion with the state court of appeals to dismiss Petitioners' state court appeal. The motion to dismiss, in summary, alleged that Petitioners had undertaken two actions which were fatally inconsistent with

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[11]In the appeal of the civil rights case now pending in the Fifth Circuit, Holloway's family and co-counsel in the Lee County cases have filed additional collateral attacks against the validity of the state court judgment in the form of original proceedings. These motions ask the Fifth Circuit *sua sponte* to declare the state court judgment void on the grounds that Holloway had a previously undisclosed diplomatic immunity from suits in Texas courts by reason of his alleged status as a Bolivian consul, that the state court judgment was obtained in an alleged violation of Holloway's civil rights and related matters. In addition, Holloway's latest wife, herself a convicted felon, in her papers to the Fifth Circuit stated that she had armed herself and threatened to do violence to anyone who attempted to enforce the turnover orders of the United States district court. Respondents' suggestion for contempt and disciplinary action based upon the making of fictitious and fraudulent claims before that court and for unethical conduct are now pending before the Fifth Circuit.

Holloway has previously attempted this pattern of collateral attacks on state court judgments in the past as an attorney. *See, Atchley v. Greenhill*, 373 F.Supp. 512 (S.D. Tex. 1974), *aff'd*, 517 F.2d 692 (5th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976) (Holloway's claims of corruption by seven then sitting members of Texas Supreme Court, two of whom are now active judges on the Fifth Circuit, were dismissed by district court as frivolous).

the further prosecution of the appeal. First, Petitioners had asserted in the turnover suit in federal court as a basis for relief that the state courts had no further jursidiction of the controversy between the parties and that all judgments by all state tribunals were void as a matter of federal law. At the same time, Petitioners asserted as appellants in the state court of appeals that the state courts had jurisdiction of the case in the appeal and should render judgment in Petitioners' favor. Second, Petitioners had sought relief in another forum related to an alleged error of the trial court which was pending or could have been pending before the state court of appeals. Under Texas law, both actions are inconsistent with further prosecution of an appeal. The Texas court of appeals conducted oral argument on March 9, 1985, on Respondents' motion.[12]

During oral argument,[13] Petitioners took the following position before the Texas court of appeals:

> (1) that the state district court did not have subject matter jurisdiction of the case [Appendix 2 at A-10]; "... the only jurisdiction anyone had of this case — that is, power, inherent power, judicial power — was possessed by the bankruptcy court . . ."[A-11]; ". . . the Court, the federal court, bankruptcy court, that had jurisdiction let this matter out on a leash . . ." [A-11];

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[12]Also before the state court of appeals was Holloway's so-called "electrocution" argument. In substance, this argument was that under federal law neither the United States district court nor the bankruptcy court could review or, in effect, recall a case which had been remanded to the state court, and since the state court had violated a condition of the remand order, thereby reinstating the automatic stay applicable to bankruptcy proceedings, neither the state nor the federal courts had any jurisdiction to render any adverse judjment against Holloway's interests. Thus, the Brownings and the state courts had "electrocuted" themselves.

[13]A transcription of the arguments of Petitioners' counsel in the Texas court of appeals is contained in Appendix 2.

(2) that the bankruptcy court had the case on a string and could pull it back whenever the bankruptcy court desired [A-12];

(3) that the Petitioners had brought to the trial court's attention alleged limitation by the stipulation with regard to Judge Walker as a visiting or retired judge [A15, 16];

(4) "that the bankruptcy law . . . does not require that it [the alleged limitation of authority] be brought to the attention of the trial judge" [A-17];

(5) "the law does not require me to complain" [A-19];

(6) that the appellants' ability to obtain further relief in the state court was a "matter of state law" [A-19, 20]; that as "I understand it," the Brownings were simply seeking in the turnover suit to require Petitioners to file a supersedeas bond or surrender the assets" [A-21];

(7) that overriding all matters of state policy and everything done ". . . it's the jurisdiction of the federal court, and unless its rules are complied with then anything occurring in the state courts is a nullity . . ." [A-24];

(8) that the state court of appeals could dismiss the appeal only on the grounds there was no jurisdiction and if the state court of appeals found there was jurisdiction, Petitioners were "entitled to bring my points of error that occurred in the trial court . . ." [A-24] and that he was entitled to take this action in both places, federal court and state court at the same time. [A-25];

(9) that Judge Sanders' ruling of no jurisdiction ". . . precludes this Court from taking any action at this time . . . [and] in my view is dispositive of the 162nd District Court judgment and this appeal . . . [and] . . . this Court cannot, in my view, make any other decision . . ." [A-26].

On July 11, 1984, the Texas court of appeals dismissed the appeal concluding:

> It is difficult to foresee what other variations from state procedures the bankruptcy court may require as conditions of remand. If the "leash" theory is upheld, state court judgments in such cases would be subject to two

> types of review for procedural errors, one in the state court system according to law, and another in the federal court on grounds that need not be raised in the state court and that may be contrary to state rules of procedure. These two types of review are fundamentally inconsistent. To allow both would be to permit a party to trifle with the state court by allowing it to proceed to a judgment which he may accept or reject at will. Consequently, we hold that if a party seeks review in the federal court of a state court judgment on the ground of an alleged violation of a condition of remand from bankruptcy court without pointing out the alleged error in the state court, he is barred from further relief under state law. Having elected an inconsistent remedy in the federal court, he is confined to the relief available there. 677 S.W.2d at 114.

Petitioners filed with the Texas court of appeals a timely motion for rehearing, which was denied.

The Fifth Circuit was informed of the Texas court of appeals' dismissal of the state appeal while it considered Respondents' appeal of the United States district court's judgment in the turnover case. In its opinion reversing the United States district court, the Fifth Circuit noted that Petitioners' state appeal had been dismissed by the Texas court of appeals for trifling with the state courts and stated that it, like the state court of appeals, condemned a practice of trifling with the state courts. *Browning v. Navarro,* 743 F.2d 1069, 1082 n.33 (5th Cir. 1984).

Petitioners, upon receipt of the Fifth Circuit's opinion, had only one week left to file an application for writ of error to the Supreme Court of Texas. Instead, Petitioners filed a Motion to Withdraw Judgment with the Texas court of appeals, urging that court to exercise its "plenary power" to grant them such relief. The Texas court of appeals, acting exactly as requested in Petitioners' motion, granted an *ex parte* order purporting to vacate its July 11, 1984 judgment of dismissal and to reinstate the case. Subsequently,

Respondents filed motions with the Texas court of appeals contending that Petitioners had filed an unauthorized and untimely second motion for rehearing in conflict with mandatory time requirements of the Texas Rules of Civil Procedure and that the court of appeals did not have plenary power to act contrary to the rules of civil procedure. Respondents also asked the court to issue its mandate to the lower court on the basis that the appeal was concluded by Petitioners' failure to meet the mandatory time requirements of the rules.

On March 26, 1985, the Texas court of appeals, *en banc*, held that Petitioners' motion "was obviously wrongfully and purposely denominated and constituted nothing more than a second motion for rehearing which could not be legally filed with this court after fifteen days . . ." of the order overruling the motion for new trial as specifically mandated by Rule 21c of the Texas Rules of Civil Procedure. The court held that its plenary power did not permit it to act contrary to the rules of civil procedure. The court concluded that its order of October 4, 1984, vacating the judgment of the court of July 11, 1984, was improperly granted and should be vacated. The court also granted Respondents' motion to issue its mandate immediately.

Petitioners filed another motion for rehearing with the court of appeals, which was overruled, and filed two separate applications for writ of error to the Supreme Court of Texas. Petitioners also filed with the Supreme Court of Texas a motion for leave to file a petition for writ of mandamus to require the Texas court of appeals to vacate its mandate and to enjoin any enforcement of the judgment.[14]

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[14]Almost concurrently with the court of appeals' decision, the United States district court granted a partial judgment in the turnover suit for Respondents on April 2, 1985, in accord with its earlier opinion of March 21, 1985, holding that the Respondents were entitled to immediate

The Supreme Court of Texas denied the Petitioners' request. Subsequently, while their petitions for writ of error were pending before the Supreme Court of Texas, Petitioners filed multiple requests for the Supreme Court to order the Texas court of appeals to vacate its mandate and to enjoin Respondents from enforcing the judgment in this case. The Supreme Court of Texas did not grant any such relief. On July 3, 1985, the Supreme Court of Texas denied the application for writ of error and subsequently denied a motion for rehearing.

REASONS FOR DENYING THE WRIT

I. THERE IS AN ADEQUATE, INDEPENDENT NON-FEDERAL GROUND TO SUPPORT THE JUDGMENT.

Petitioners ask this Court to grant its writ of certiorari to review the original judgment of the Texas court of appeals dismissing their appeal in this case dated July 11, 1984. However, that judgment was vacated by the Texas court of appeals' order dated October 4, 1984.

Five months later, on March 26, 1985, the Texas court of appeals, *en banc,* set aside its order of October 4, 1984, reinstated the judgment of July 11, 1984, and directed immediate issuance of mandate. [Petitioners' Appendix I, at 117a]. The Texas court of appeals judgment of March 26, 1985, was based solely on an interpretation of the Texas Rules of Civil Procedure.[15] The Texas court of appeals held that the Petitioners filed an untimely second motion for rehearing

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possession of the property over which they had a constructive trust during the pendency of the state court appeal. Petitioners repeated requests to the Supreme Court of Texas to enjoin any enforcement of the judgment sought to prohibit compliance with the United States district court's turnover orders.

[15]Even Petitioners find no constitutional grounds to attack the March 26, 1985, judgment and supporting opinion of the Texas Court of Appeals, which rests solely on interpretation of state law.

without complying with the rules permitting proper motions for an extension of time for filing motions for rehearing. The court held that under Texas law a court of appeals could not exercise its plenary power in derogation of the strict time limitation imposed by the Texas Rules of Civil Procedure for filing motions for rehearing or requesting extensions of time for filing such motions. *Humble Exploration Company v. Browning,* 690 S.W.2d 321, 328 (Tex. App. — Dallas 1985, writ ref'd n.r.e.). [Petitioners' Appendix E, at 81a-82a].

Thus, the March 26, 1985 judgment of the Texas court of appeals is independently supported by the Petitioners' failure to observe the Texas procedural rules necessary to seek a review of the prior July 11, 1984 judgment. The Texas Supreme Court's denial of a writ of error approves that judgment of the Texas court of appeals. *See, Gammel Statesman Publishing Co. v. Ben C. Jones & Co.,* 206 S.W. 931 (Tex Comm'n App. 1918, holding approved).[16]

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[16]Petitioners ignore the March 26, 1985 judgment and supporting opinion of the Texas court of appeals. They apparently argue in a footnote that the Supreme Court's refusal to grant Respondents' motion to strike Petitioners' application for writ of error somehow overrules the Texas court of appeals' March 26, 1985 judgment and opinion. There is no basis in Texas law to support this argument. A more likely explanation for the Texas Supreme Court's orders is its intent to approve both opinions of the Texas court of appeals.

On March 26, 1985, the mandate of the Texas court of appeals issued immediately pursuant to its judgment. Despite Petitioners' repeated requests, the Supreme Court of Texas consistently refused to order the Texas court of appeals to vacate or withdraw its mandate. If the Supreme Court of Texas had determined that the March 26, 1985 opinion and judgment was incorrect as a matter of Texas law, it would have been obligated to require the court of appeals to vacate its mandate.

The Fifth Circuit in Holloway's appeal of the civil rights case has held that the federal courts must give full faith and credit to the finality of the mandate of the Texas court of appeals. *Holloway v. Walker,* Order in No. 85-1289 (5th Cir. August 12, 1985).

It is a settled rule of this Court that where the judgment of a state court rests upon two grounds, one of which is non-federal in character, its jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corporation v. Muller,* 296 U.S. 207, 210, (1935); *Board of Supervisors of Fairfax County, Virginia, v. Allman,* 423 U.S. 940, (1975); *Minnesota v. Andrews,* 419 U.S. 881, (1974). The court of appeals' March 26, 1985 judgment, based upon Petitioners' violations of mandatory time requirements set forth in the Texas Rules of Civil Procedure,[17] rests upon separate, adequate state grounds.[18]

II. THE RECORD DOES NOT RAISE THE QUESTIONS PETITIONERS PRESENT.

In a desperate effort to attract the attention of this Court, Petitioners misstate and attempt to reconstruct the record of this case in several important instances, so as to state hypothetical questions which are not otherwise present in this case. First, Petitioners claim this record requires review of a litigant forced to trial before a corrupt and biased judge. As a corollary, Petitioners contend that this Court is obliged to accept their allegations of corruption as true, whether or not they are raised by the record. Second, Petitioners assert that the Texas courts have decided their case upon novel

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[17]Petitioners' claim that it is undisputed that they have fully complied with every procedural aspect of applicable Texas Rules of Civil Procedure is unwarranted. While Petitioners may have complied with the applicable rules in initiating their appeal, the court of appeals has found that they did not comply with the applicable rules after the court's July 11, 1984 judgment in order to preserve the same issues for subsequent appellate review.

[18]There is no contention that the Texas court of appeals made its March 26, 1985 decision in an improper attempt to deprive Petitioners of an appeal of federal issues.

and unprecedented interpretations of Texas procedure, which offend due process and, finally, that this case presents some example of unfair or disparate treatment of indigents so as to justify review. In fact, none of these issues is presented by the record in this case.

1. Petitioners' Claims of a Trial Before a Biased and Corrupt Judge.

Only after Judge Walker had ruled adversely to them in the receivership proceedings and set this case for trial did Petitioners complain about his impartiality. Even then, their motion to recuse alleged that a person might reasonably question the appearance of impartiality. There is no claim in their motions that Judge Walker was corrupted. The Petitioners' motion was heard for two days by an independent visiting judge. There is no suggestion in their brief to the court of appeals, nor even in thier petition to this Court, that they did not receive due process before Judge Rolston in the consideration of that motion.

Perhaps the best evidence of Petitioners' actual complaints in this case is found in their brief to the Texas court of appeals, pertinent portions of which are attached in the Appendix. In that brief, although they claimed that both Judge Walker and Judge Rolston had erred in failing to recuse Judge Walker, the Petitioners made no affirmative claims whatever that either judge was corrupt. [Appendix 3 at A-35-49]. This appeal was taken in 1982, and the record in this case has not changed since that time. What has happened is merely that Petitioners have substituted for the issue presented to the Texas appellate courts in this case their unsworn and unsubstantiated allegations in the civil rights case, the RICO case and the Lee County cases to the effect that they have had their property taken from them in a sham trial resulting from a conspiracy among the counsel,

the judge, and apparently even the appellate courts of Texas, as well.[19]

Recognizing that the record simply does not support this position, Petitioners assert that *Griffin v. Illinois*, 351 U.S. 12, 16 (1956), requires this Court to accept such assertions as true for the purpose of granting review. *Griffin v. Illinois* is not applicable to this case. *Griffin* involved claims of criminal defendants who alleged that there was reversible error in the trials resulting in their conviction, but they were precluded from showing any error because they could not financially afford a transcription of the trial proceedings to obtain a meaningful appeal. Under those circumstances where no record was available and the very issue under review was the necessity for a record to receive a meaningful appellate review, this Court assumed that the defendants' contentions of reversible error were true.

In this case there is a voluminous appellate record. Thus, it is not necessary to assume that Petitioners' allegations are correct without a review of that record. Moreover, both the July 11, 1984 opinion of the court of appeals and the statements by members of the court during the oral argument show that the court of appeals had extensively reviewed the record before it and was knowledgeable about Petitioners' various allegations of error. What public purpose is served by assuming allegations to be true that are shown by the record to be false?

Moreover, assuming arguendo that the *Griffin* standard would apply, the facts which this Court would then accept as

[19]Petitioners argue that in the civil rights case, the United States district court found there was competent evidence that Judge Walker and one of Respondent's counsel were engaged in a conspiracy to rig the outcome of the trial. Contrary to the impression given by Petitioners, the United States district court has made no finding that there was any conspiracy; it simply held that there was a sufficient question on " . . . an inference of a conspiratorial agreement . . ." to prevent granting summary judgment to Respondent's counsel. [Petitioners' Appendix H, at 112a.] In contrast, the United States district court did hold that the Respondents were not involved in any conspiracy claimed by Petitioners. [Appendix 1, at A-3.]

true would be the allegations of Petitioners in their brief to the Texas court of appeals and not their allegations in the civil rights case as brought forward to this Court in the petition.[20] Indeed, Petitioners do not challenge the due process of the recusal hearing before Judge Rolston at all. Thus, their suggestion that they were forced to trial before a biased judge without any opportunity for an independent review of the trial judge's impartiality is not supported by the record. Due process does not require additional review of Judge Rolston's decision.

2. Petitioners' Allegations of Novel and Unprecedented Procedural Determinations.

Petitioners' second claim that the Texas court of appeals' dismissal of their appeal was based on novel procedural grounds is totally contrary to extensive prior Texas case law and likewise is not supported in this case. The court of appeals dismissed the Petitioners' appeal because Petitioners sought two fundamentally inconsistent forms of

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[20]The court can compare Petitioners' allegations in this Petition to the claims presented to the Texas court of appeals in their brief to that court. [Appendix 3 at A-35 *et seq.*] Petitioners' claim that Judge Walker was a biased and corrupted judge follows a familiar pattern. When the suit was initially filed, Petitioners claimed that the original trial judge, Judge Snodgrass, had a "peculiar and unusual relationship" with Respondents' counsel; after Judge Walker made adverse rulings in the receivership suit, Petitioners claimed that Judge Walker lacked the appearance of impartiality; after Judge Rolston determined there were no grounds to recuse Judge Walker Petitioners claim that his decisions were contrived and improper; after Judge Walker presided in the trial resulting in a verdict against them, Petitioners alleged that Judge Walker was biased and corrupted; and now in this Court, Petitioners claim that the Texas court of appeals and, in effect, the Supreme Court of Texas, have deliberately mischaracterized the record and entered a judgment contrary to all previous Texas case law in order to preclude Petitioners from obtaining any appellate review on the merits.

Such allegations of wholesale misconduct by both trial and appellate judges are consistent with prior attacks that Holloway has made on courts that ruled against him. *See*, footnote 11, *supra*.

review in an attempt to permit them to accept or reject the judgment of the Texas courts at will. The court's holding that parties lose their right to an appeal by conduct inconsistent with their appeal was not novel.

This principle was clearly set forth over fifty years previously in *Winters Mut. Aid Ass'n Circle No. 2 v. Reddin*, 49 S.W.2d 1095, 1096 (Tex. Comm'n App. 1932) (holdings adopted), in the following language:

> The rule is well settled that, if it appears that the matters complained of in the equitable suit to vacate the original judgment could have been presented to the trial court in the original proceedings, and brought up by appeal for review, a suit in equity to vacate the judgment would not lie. This rule rests upon the principle that it is the policy of the law to avoid a multiplicity of suits. [citations omitted]. *The rule is also well established that the right to appeal or to bring error may be waived by pursuing a remedy inconsistent with an appeal or writ of error. 3 Tex.Jur. p. 159, § 100.* The foregoing rules will not be invoked in this case, unless it is shown that plaintiff in error *has pursued a remedy inconsistent with an appeal* or writ of error, and that the matters complained of in the suit in equity to set aside the original judgment could have been presented to the trial court for ruling thereon, and brought up by appeal.[21] (emphasis added).

Indeed, the compendium of Texas law, TEXAS JURISPRUDENCE, has at least since 1959 specifically cautioned, "The

[21]Petitioners suggest without analysis that *Reddin* is somehow inapplicable because the second proceedings referred to in that case involved a direct review by an equitable bill of review as opposed to the collateral attack pursued by Petitioners in this case. This distinction is unavailing. If anything, the teachings of *Reddin* apply with even greater force to collateral attacks because the Supreme Court of Texas has consistently held that the only proper method of attacking an erroneous judgment after the time for direct appeal has expired is by means of bill of review, not a collateral attack. *See, Middleton v. Murff*, 689 S.W.2d 212 (Tex. 1985).

right to appellate review may be lost by the pursuit of an inconsistent remedy," citing *Reddin*. 4 TEX.JUR.3d, *Appellate Review*, § 163, at 261 (1980); 3 TEX.JUR.2dREV., *Appeal and Error — Civil Cases*, § 195, at 597 (1959).

Petitioners' remedy in the turnover suit was inconsistent with the further right of state appeal, under *Reddin*, because: (1) Petitioners asserted in the federal court that the state courts had no jurisdiction over the case because of an alleged violation of the remand order and, thus, that all state proceedings were void, while at the same time asserting in the state courts that the state appellate court did, in fact, have jurisdiction and should proceed to adjudicate the appeal or delay its adjudication, as Petitioners might request. Obviously, these two positions and the remedies sought are at fatal variance. Either the state court has jurisdiction to proceed or it does not, and a party is entitled to but one adjudication of the validity of that contention. Second, by raising a matter which was or could have been raised in the state trial court, i.e., compliance with the conditions of remand and whether or not objection was made on this ground, Petitioners directly invaded the actual or potential jurisdiction of the state court of appeals.[22] Having originally obtained a favorable decision in the federal courts, which precluded further state review of the validity of the judgment,[23] Petitioners seek now to complain that the Texas

[22]Petitioners contended in oral argument before the state court of appeals [Appendix 2 at A-15, 16] and before this Court [Petition, at 6], that they did, in fact, raise these issues before Judge Walker in the state trial court. The state court of appeals found as a fact that they did not. 677 S.W.2d at 113. *See* discussion, *infra*. Whether Petitioners did, in fact, or could have raised the issues is not controlling. Under *Reddin*, whether the issue was or could have been, pending before the court of appeals, collateral proceedings to determine the same issue are inconsistent with the further prosecution of an appeal and are, thus, prohibited.

[23]The decision of the United States district court was entitled to immediate preclusive effect in the state courts as *res judicata* under this Court's decision in *Reed v. Allen* 286 U.S. 191 (1932). Thus, it would have been improper for the state court of appeals to have proceeded further. *See* discussion, *infra* at p. *24*.

court of appeals' correctly disposed of the case under the circumstances Petitioners presented to it.

Petitioners also contend that they enjoy an unbridled right to obtain review of the validity of state court proceedings in the lower federal courts. This Court has held to the contrary in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983), where it held that lower federal courts possess no power whatever to sit in direct review of state court decisions.[24] The Court specifically stated:

> If the constitutional claims presented to a United States District Court are inextricably intertwined with a state court's denial in judicial proceedings of a particular [party's claim for relief], then the District Court is in essence being called upon to reveiw the state court decision. This the District Court may not do. 460 U.S. at 483-484 n. 16.

3. Petitioners' Indigency Claims.

Petitioners next imply that Texas bars appeals in civil cases to defendants who cannot provide a supersedeas bond

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[24]The issue is not one of "punishment" of Petitioners for asserting federally protected rights. Petitioners were free to make their *Kalb v. Feuerstein* 308 U.S. 433 (1940), argument before the state trial court or the state court of appeals if they wished to do so. This Court has consistently held that state courts are equally qualified to decide issues of federal law when raised in state proceedings. *Gulf Offshore Co. v. Mobil Oil Co.*, 453 U.S. 473 (1981). Here, however, the Petitioners, made a tactical choice to reduce their *Kalb v. Feuerstein* claim to judgment in the United States district court, foreclosing a state court review of the same issues. Had Petitioners attempted a similar action within the state system by filing a collateral attack in a Texas district court, the court of appeals could have dismissed the appeal or prevented actual or potential interference with its jurisdiction by the issuance of a writ of prohibition. *Taft v. Schraub*, 557 S.W.2d. 172 (Tex. Civ. App. 1977). However, state courts are without authority to enjoin the litigants from asserting whatever position they like in the federal courts. *Donovan v. City of Dallas* 377 U.S. 408 (1964). Therefore, the only action available to the Texas court of appeals was to dismiss the appeal.

set by the trial court.[25] Again, such an issue is not raised by either the court of appeals' opinion or the record.

The right of a party to appeal an adverse final judgment, whether granted by statute or state constitution, is not synonymous with any right to stay proceedings to enforce a judgment pending appeal. Texas courts, like their federal counterparts, permit a stay of proceedings to enforce the judgment when the appellant gives an approved supersedeas bond which protects the rights of the appellees to effectuate the judgment if appellant fails to reverse the judgment on appeal. *Compare* Fed.R.Civ.P. 62 with Tex.R.Civ.P. 364. A party's ability to post supersedeas is totally distinguishable from a party's ability to take an appeal. There is no suggestion in this record that Petitioners were not permitted by the Texas courts to appeal the judgment against them because they were unable to post a supersedeas. Indeed, Petitioners admit that they did, in fact, appeal, although they never posted any supersedeas bond. Thus, this issue is entirely hypothetical.[26]

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[25]In their argument, Petitioners compare themselves with impoverished criminal defendants whose poverty prevents them from taking an appeal. Petitioners were not impoverished and there is nothing in the record to indicate that lack of funds prevented Petitioners from adequately preparing their appeal in this case. Indeed, the record is voluminous and Petitioners' brief to the court of Appeals exceeded 500 pages and presented 211 points of error.

[26]Petitioners intimate that Judge Walker set the supersedeas bond at an improperly high amount to prevent the Petitioners from posting it. The record does not support this allegation. Tex.R.Civ.P. 364 provides that the amount of the supersedeas bond, with respect to money damages, shall be at least the amount of the judgment, interest and costs; when judgment is for recovery of land or other property, the bond is to pay for the value of the rent or hire of such property during the appeal in an amount estimated by the trial court. When judgment is for recovery of specific personal property, the supersedeas amount is to be fixed by the court, not less than the value of said property, on the day of judgment. The judgment awarded Respondents $72,000,000.00 damages and exten-

Moreover, even if an abstract constitutional point on indigency could be postulated in this case, Petitioners can present no such claim. Petitioners waived that claim in this case by leaving the protection of the bankruptcy court and its automatic stay for financially troubled defendants, and further by agreeing as a condition of remand to provide appropriate supersedeas protection if they lost in the state trial court. Petitioners, being dissatisfied with the agreement they reached in the bankruptcy court for remand, cannot now convert their contract difficulties into constitutional claims.

III. Petitioners Ask This Court To Redetermine a Factual Issue.

The Texas court of appeals dismissed the Petitioners' appeal because of the inconsistent review sought and obtained by Petitioners in federal court of a matter that could have been but was not presented to the state trial court. The court of appeals specifically held that it had searched the voluminous record after asking Petitioners for a specific citation and did not find the claimed objection has been properly presented or preserved.

Petitioners claim that the Texas court of appeals finding of fact regarding the record is "a mischaracterization of the record." [Petition at 6 n. 2.] Notably, Petitioners do not

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sive properties and corporate stock that Petitioners admit was worth $50,000,000.00. Pursuant to Tex.R.Civ.P. 364, the trial judge was required to set a supersedeas bond at $122,000,000.00, plus an additional reasonable amount for interest and damages. Post-judgment interest in Texas in 1982 was nine percent (9%). Even assuming that the court costs are negligible, the additional $8,000,000.00 would only cover interest for 266 days. The supersedeas bond was low, not high. Moreover, Tex.R.Civ.P. 365 authorizes the state appellate court to review the amount of a bond fixed by the trial court for excessiveness. There is no suggestion by Petitioners that they ever sought to have the amount of supersedeas bond reviewed by the state appellate courts.

favor this court with an explanation of how the Texas Court of Appeals has mischaracterized the record, or more precisely, where in the voluminous record Petitioners presented and preserved the issue. Instead they seek to have this Court review the voluminous record to determine whether it disagrees with the Texas court of appeals' finding that Petitioners failed to present properly and to preserve the alleged point of error in the state courts. This court does not grant certiorari to review evidence or to determine or discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227, (1925).

IV. The Dismissal of Petitioners' Appeal was Consistent with Policies Announced by This Court.

There are substantial policy reasons supporting the Texas court of appeals' dismissal of Petitioners' appeal under the circumstances. When Petitioners sought and obtained a judgment in the United States district court holding that the state courts had no jurisdiction of this case, this action raised significant issues of *res judicata*, comity, mootness, election of legal recourse and judicial capabilities. The United States district court's judgment in the turnover suit, which held that the state district court was without jurisdiction and the judgment in this case was unenforceable, was entitled to immediate preclusive effect under the doctrine of *res judicata* as a matter of substantive federal law. *Reed v. Allen*, 286 U.S. 191 (1932). Thus, it would be a violation of both the federal standards of *res judicata* and the doctrine of comity between state and federal courts for the Texas court of appeals to have attempted to address further the validity of the judgment. Moreover, the Texas court of appeals could not have proceeded to hear the merits of the appeal because the judgment of the United States district court had ren-

dered moot the issue of the validity of the judgment. Texas courts have no jurisdiction to render advisory opinions. *United Services Life Insurance Company v. Delaney*, 396 S.W.2d. 855 (Tex. 1965).

Finally, the necessity to utilize limited judicial resources of Texas in the most effective manner required the dismissal.[27] With the floodtide of cases burdening the courts, appellate courts cannot afford to delay consideration of appeals before them so as to permit parties to initiate collateral attacks on the judgment in other forums and pursue those proceedings to their ultimate resolution while the original appeal waits in the wings. Due process of law does not require the courts to await the pleasure of litigants on the ultimate outcome of their tactical decisions to resolve the cases on their dockets. Having already obtained a preclusive decision in their favor, Petitioners did not then seek a resolution of their state appeal by the Texas court of appeals. Instead they asked the state court of appeals to stand by indefinitely until such time, if ever, as Petitioners might desire to again avail themselves of the services of the state judiciary. Due process does not require the state appellate courts to accept such demands.

Each of these policies supported the decision of the court of appeals to dismiss the appeal when Petitioners took action inconsistent with their rights to continue that appeal. Furthermore, this Court has previously announced in a variety of situations that a person may lose his right to seek affirmative relief by abusing the judicial system. *See, Link v.*

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[27]The panel assigned to this case for the Texas court of appeals was specially appointed pursuant to a recent statutory authority. 677 S.W.2d at 111. Two members of the panel were retired appellate justices, who volunteered to continue serving the Texas judicial system. Realistically, such a panel could not be maintained indefinitely.

Wasbash R.R. Co., 370 U.S. 626 (1962) (dismissed for failure to attend pretrial conferences); *Nat'l Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (dismissed for failure to obey dicovery orders); *Estelle v. Dorrough*, 420 U.S. 534, *reh'g denied* 421 U.S. 921 (1975) (dismissal of appeal of prisoners who had escaped).

Indeed, in *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954), the Court held that due process did not prevent a state supreme court's dismissal of an appeal because the appellant refused to deliver to a court-appointed receiver bonds which appellant owned, which were located in another state, and which were the only assets upon which the state court judgment could be collected. This Court concluded, 348 U.S. at 45:

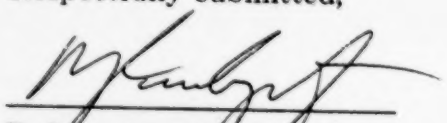
> Viewing the dismissal of petitioner's appeal in light of its reasonableness in sustaining the effectiveness of a state's judicial process, as against the rights of a judgment debtor, without filing supersedeas bond, to refuse to comply with orders safeguarding the value of that judgment, we find nothing that violates due process of law.

Here also the Petitioners sought to render the state judicial process ineffective unless it ruled in their favor. The court of appeals did not violate due process when it acted to protect the integrity of the Texas judicial system. As this Court stated in *Nat'l Hockey League*, 427 U.S. at 643, dismissal is appropriate ". . . not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."

CONCLUSION

FOR THESE REASONS, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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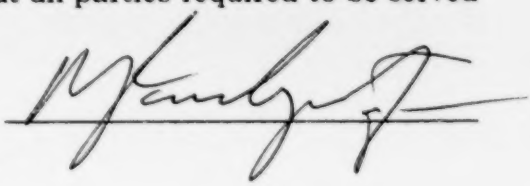
CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 1986, three copies of Respondents' Brief in Opposition were mailed, postage prepaid, to both Mr. J. Bruce Bennett, of Reynolds, Allen & Cook, Incorporated, 3300 Allied Bank Plaza, Houston, Texas 77002, attorneys for Petitioners, and to Mr. Joseph Geary, Geary, Stahl & Spencer, 2800 One Main Place, Dallas, Texas 75250, counsel for Robbie Holloway. I further certify that all parties required to be served have been served.



APPENDIX

APPENDIX 1

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-82-1846-H

PAT S. HOLLOWAY, et al.,

Plaintiffs

v.

JUDGE DEE BROWN WALKER, et al.

Defendants

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendants The Browning Interests'[1] Motion for Summary Judgment and Motion to Dismiss, filed January 29, 1985; Plaintiffs' Response, filed February 21, 1985; and Defendants' Rejoinder, filed March 13, 1985.

Defendants have adopted the Motion for Summary Judgment of Defendant R. Jack Ayres, Jr. Rather than reproduce here the lengthy ruling on that Motion, the Court hereby incorporates the Memorandum Opinion and Order, filed March 11, 1985. The Court granted the Motion with respect to Plaintiffs' procedural due process claims, and denied it in all other respects.

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[1]Jane H. Browning, Michael G. Starnes, Catherine Agnes Land Starnes, Katherine Browning Cook, Averille Browning Dawson, William Browning III, Winifred Fallon Browning, and Robert Browning.

Defendants here argue that there is no summary judgment evidence linking them with the alleged conspiracy to deprive Plaintiffs of their constitutional right to a fair trial. They argue that they cannot be held vicariously liable for any actions of their attorneys, Defendants Kelsoe and Ayres.

Michael Starnes and Jane Browning have provided affidavits stating that they "handled all of the direction and guidance to the attorneys in [the state cases]." They avow that they had no *ex parte* contacts or communications with Judge Walker[2], and never "authorized either of our attorneys or any other party to make any improper effort to obtain Judge Walker to rule in any manner in our behalf in either the *Browning v. Holloway* case or the *Fairway Land* case". Further, they state that they "have not participated in nor have I or anyone else representing the Browning Interests authorized our attorneys or anyone to manipulate the docket, conspire with others or in any other manner attempt to improperly affect the result of either the *Browning v. Holloway* case or the *Fairway Land* case.

Plaintiffs have produced no evidence rebutting this denial. They have cited no acts allegedly committed in furtherance of the conspiracy by the Brownings. Although there certainly is a line of authority for supervisory liability under § 1983, there is no fact issue as to any improprieties in control or direction of the attorneys, *see Rizzo v. Goode*, 423 U.S. 362 (1976), personal participation, affirmative promotion of a policy which sanctions the type of action which caused the violation, *see Duchesne v. Sugerman*, 566 F.2d 817, 830-31 (2d. Cir. 1977), or violation of an explicit duty to supervise. *See Howard v. Fortenberry*, 723 F.2d 1206 (5th Cir. 1984).

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[2]Plaintiffs have presented evidence pertaining to alleged ex parte meetings involving Starnes on May 14, 1982, and Jane Browning on August 31, 1982. The May meeting, prior to the filing of the lawsuits, was in no sense improper, *see* Gillette, Weiss, Musselwhite and Ayres affidavits, filed with Defendant APP Entities' Motion, and is not relevant to the civil rights claim as defined by this Court. Jane Browning was not present at the August meeting. Nye Affidavit.

Although the Court recognizes the importance in a civil rights conspiracy action to allow a plaintiff to prove all permissible inferences from actions shrouded in secrecy, *see Ferguson v. Omnimedia, Inc.*, 469 F.2d 194, 198 (1st Cir. 1972), Plaintiffs have not, after years of discovery, produced sufficient evidence of conspiratorial agreement or conduct by the Browning Interests.

Accordingly, Defendants' Motion for Summary Judgment should be, and hereby is, GRANTED IN PART with respect to the federal claims and RESERVED with respect to the pendent state-law claims.

SO ORDERED.

DATED: March 28, 1985.

/s/ BAREFOOT SANDERS
Barefoot Sanders
United States District Judge

APPENDIX 2

No. 05-82-01378-CV

IN THE

COURT OF APPEALS

FOR THE
FIFTH SUPREME JUDICIAL DISTRICT
OF TEXAS AT DALLAS

HUMBLE EXPLORATION COMPANY, INC. et al.,
Appellants

v.

JANE H. BROWNING, et al.,
Appellees

ORAL ARGUMENT ON APPELLEES' MOTION TO DISMISS

BE IT REMEMBERED that on the 9th day of March, 1984, the above entitled cause came on for hearing in open court before a special panel appointed by the Honorable Jack Pope, Chief Justice of the Supreme Court of Texas, consisting of Chief Justice Clarence Guittard, Retired Justice Claude Williams, and Retired Justice Quentin Keith, at the Dallas County Courthouse, in the City of Dallas, County of Dallas and State of Texas, and the following proceedings were had.

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ALSO PRESENT:

MR. PAT S. HOLLOWAY	*Pro Se*
MR. TIMOTHY VINEYARD	*Attorney for Don Navarro, Trustee*
MR. G. LEROY STREET	*Attorney for Robbie Holloway*

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PROCEEDINGS

CHIEF JUSTICE GUITTARD: We have another chapter in this rather extraordinary saga. The — I think probably the issue before us today is whether we dismiss the appeal or whether we abate the appeal and postpone further consideration of the case until the federal courts finally determine whether Judge Sanders' order holding the judgment appealed from here void is a valid judgment so far as the federal courts are concerned.

And since I guess the greater burden is on the party here that is asking us to dismiss the appeal, we will treat the Appellee as the moving party here and we'll hear from him first and then give him an opportunity to rebut.

Now, before we go further I'd like to say that we heretofore entered an order that all — that all matters filed before us would be filed by Mr. Bickel on behalf of all Appellants and we note here that Mr. Holloway individually has filed a motion on January 17th, which I don't think really affects what we're going to be doing here anyway, but in any event for the record we will strike that motion because it's not anything — because it's in violation of our previous order.

Now, we have this perspective on the problem. Judge Sanders' order holds that the judgment appealed from here is void because the trial court had no jurisdiction because the trial proceeded in violation of the conditions in the stipulation upon which the order of remand of the case was made from the bankruptcy court.

We have searched this record and have failed to find any indication that that matter was asserted before Judge Walker or in the trial court to any extent.

There was considerable motions and countermotions in the — at the trial court level as to whether the 162nd Court should — could properly hear the case in view of the prior pendency of the action in the 193rd Court, and this — and points were raised there and preserved here as to the propriety of the 162nd Court proceeding rather than the 193rd Court.

We understand that there was a motion made in the 162nd Court in the case which was already pending there brought by Fairway Corporation or some third party to consolidate the present case which was filed in the 193rd Court with the case filed in the 192nd (sic) Court.

And we examined the record in that case to determine whether or not there was any objection — or there was objection, but whether there was objection on the ground that — that it was — that the appeal could only be — that the case could only be heard before a retired or visiting judge under the federal court's order. We didn't find anything of that sort and, if there was some, we would like for you to direct our attention to it.

Actually, of course, the — that point didn't really affect the consolidation because whether or not the case proceeded in the 162nd Court was quite apart from the question of whether Judge Walker was qualified under the federal court's order to hear the case because, even if it were — were tried — even if it were consolidated into the 162nd Court, then of course Judge Walker, if he had acted in accordance with that stipulation, could have asked for a visiting judge to come in and try the case.

We don't find in the record any motion made before Judge Walker asking him to bring in a visiting judge for the purpose — for the reason stated in the federal court's order and the stipulation.

So, as far as we can tell — of course there was an order, there were proceedings to disqualify Judge Walker for bias and other matters, but we didn't find that this matter was ever raised in the trial court and we don't really know whether that point — we don't really think that matter was properly raised before this court.

The only point of error that purports to come anywhere near close to it is point 20 or 21 I think it is, and we looked at the argument under that point and it nowhere asserts this stipulation and that the — the trial before Judge Walker rather than before a visiting or retired judge was in — contrary to the federal court's order.

So we have an extraordinary situation to where the Appellants here have gone into the federal court and have attacked the order appealed from, for lack of jurisdiction on a ground that wasn't presented to the court in which the case was pending here.

And so the question arises as to whether by going — by not raising the matter in the trial court here and by going into the federal court and asserting it, the Appellants here have precluded themselves from any relief before this court.

Now, we also are much concerned about the effect of that — of Judge Sanders' order. It seems extraordinary to us that if the — that the federal court could send a case to the state court and prescribe the manner in which the case would be tried before the state court. We really don't think the federal courts have power to do that, and if they say that they have power to do that, as Judge Sanders has said, and that may ultimately prevail as the law in the federal courts — if that's the position of the federal courts, we are inclined to the view that the state courts ought not to accept any case remanded under those circumstances and should immediately dismiss a case which is remanded under circumstances that directs the trial court — our court — to proceed under laws that are contrary to our own laws and procedure.

Of course, if we — it would be extraordinary for us to hold that here and reverse the trial court's judgment and dismiss that when — dismiss the lawsuit on that ground, when that was never brought to the trial court's attention.

So we think that perhaps a more appropriate response to that would be to consider whether or not the Appellants' position in asserting that matter in the federal court, without having asserted it in the trial court, preceded — precludes the Appellants from any relief by way of an appeal in this court.

So I — that seems to be the issue that we have before us here, and on that issue we'll hear the arguments of counsel. Mr. Ayres?

* * *

ARGUMENT

MR. BICKEL: Gentlemen, as a given, we take the position that we could raise the question in issue of jurisdiction of the subject matter in the trial court at any time. That we can —

CHIEF JUSTICE GUITTARD: But we don't have any record before us that — that would support your argument, though. How do we do that?

MR. BICKEL: Judge, I'll talk about that issue.

CHIEF JUSTICE GUITTARD: Okay.

JUSTICE WILLIAMS: You take the position that this order directing the trial court to try before a certain kind of a judge is jurisdictional?

MR. BICKEL: Judge Williams, I'll take that up first.

CHIEF JUSTICE GUITTARD: Well now, the 162nd Court had jurisdiction of the case, of the subject matter.

MR. BICKEL: We don't think so. We don't think it did.

CHIEF JUSTICE GUITTARD: Well, apart from the question of whether it was properly in the 193rd or in the 162nd. I mean, apart from that question.

MR. BICKEL: Your Honor, apart from that and we don't think it did.

CHIEF JUSTICE GUITTARD: Now, the hundred — There wouldn't have been any problem about it.

MR. BICKEL: The requirements of the Cleveland-Ward had been met.

CHIEF JUSTICE GUITTARD: Well, I don't see any problem with Cleveland versus Ward as you do, but I mean assuming that, well, there's nothing wrong with the district — with a visiting judge under this stipulation trying the case in the 162nd since I don't think the —

MR. BICKEL: I'm a bit off guard, Judge Guittard, because I haven't reviewed the stipulation, but I think what you say is generally correct.

CHIEF JUSTICE GUITTARD: All right. Then you're in the position of saying that although the Court had jurisdiction, the trial judge was disqualified rather than the question of jurisdiction.

MR. BICKEL: No. The trial judge and court didn't have jurisdiction. See, now, this is the point I've been hanging on. I believe that the only jurisdiction anyone had of this case — that is, power, inherent power, judicial power — was possessed by the bankruptcy court. I believe that.

CHIEF JUSTICE GUITTARD: Well, then if we didn't —

MR. BICKEL: May I — Go ahead.

CHIEF JUSTICE GUITTARD: Then if we didn't have — have the power, then we're back under that insurance case and we ought not to have done anything, right?

MR. BICKEL: Wait a minute. I believe that the parties and the Court, the federal court, bankruptcy court, that had jurisdiction let this matter out on a leash.

JUSTICE KEITH: They had a string and could pull it back whenever you wanted to?

MR. BICKEL: Yes. If the Court order of remand of the federal judge —

CHIEF JUSTICE GUITTARD: Well, don't —

MR. BICKEL: — who had jurisdiction was not complied with to the letter, then he could pull it back any time he wanted to.

CHIEF JUSTICE GUITTARD: Well, under those circumstances don't you think we —

MR. BICKEL: Not pull it back, Your Honor. I think it goes back. It's automatic.

CHIEF JUSTICE GUITTARD: Don't you think under those circumstances our courts just ought not to ever assume any jurisdiction over a case that's on that kind of a leash?

MR. BICKEL: Well, that's philosophical. I mean, the parties wanted it to.

CHIEF JUSTICE GUITTARD: Well, it's not as philosophical because, if they didn't have power to do it, wasn't it your duty to call that to the trial court's attention.

MR. BICKEL: —

CHIEF JUSTICE GUITTARD: And failing that, how can you have a — how are you in a position to ask any further relief from the state of courts?

MR. BICKEL: May it please the Court. The first thing that the Browning Interests — You must bear in mind that the Fairway case was initiated in the one six two, 162nd, the receivership case, which the Brownings were made parties defendant, and a receivership was granted and that was appealed from and the Brownings filed pleadings in the Fairfield case — Fairway case I think it is — and in those pleadings they led off with a declaratory judgment action

asking Judge Walker to — Mr. Ayres is just frankly wrong about when this came to the attention of the trial court — asking Judge Walker to declare that as a matter of right, the stipulation which was affixed to the pleadings was no longer binding. And that's in your records.

JUSTICE WILLIAMS: Well, wasn't that the time that the bankruptcy judge ought to have pulled his string? Right then?

MR. BICKEL: Well, it would have been a good time, Judge, but —

JUSTICE WILLIAMS: Why didn't he?

MR. BICKEL: The reason —

JUSTICE WILLIAMS: Didn't you go back and tell him to pull the string?

MR. BICKEL: Well, I didn't — we went back and told him that we thought this was merely a contrived way to try the Browning case on the merits before the one six two, and he said, "No. What you're talking about there is the Fairway case, not the Browning case, and I'm going to issue" — There were other agreements which were with respect to —

What I'm trying to say is the Fairway case has been removed. And the federal judge said, "No, I'll tell you what. As far as I'm concerned, the Fairway case goes back to state court and I abstain from it." But that didn't affect the Browning case.

CHIEF JUSTICE GUITTARD: Well, why was it not your duty in the Browning case to call it to Judge Walker's attention that this stipulation precluded him from proceeding in the case?

MR. BICKEL: I figured I would go do it when they tried the declaratory judgment action, which I was told we were trying.

JUSTICE KEITH: You found out sooner or later in the trial in Judge Walker's court that you were trying the Browning case I think.

MR. BICKEL: Instantly, Your Honor.

CHIEF JUSTICE GUITTARD: And then —

JUSTICE KEITH: Well, did you object then?

MR. BICKEL: Yes.

CHIEF JUSTICE GUITTARD: On what grounds?

JUSTICE KEITH: Well, you —

MR. BICKEL: On the ground that the sole jurisdiction was with Judge Harless, the 193rd Court, because that followed the stipulation.

CHIEF JUSTICE GUITTARD: All right. Then —

JUSTICE KEITH: Cleveland versus Ward. Is that your Cleveland —

MR. BICKEL: Sir?

JUSTICE KEITH: That's your Cleveland against Ward theory?

MR. BICKEL: Well, no. It's more than that.

JUSTICE KEITH: That's not —

MR. BICKEL: You understand the stipulation — Your Honor, as Your Honor will recall, it had been correctly assigned under the bankruptcy stipulation to Judge Harless, 193rd —

JUSTICE KEITH: Will your write —

MR. BICKEL: — a visiting, retired judge.

JUSTICE KEITH: Will you write a letter to the Court, just a one-page letter, as to where we can find that in the record? That you made an objection there because it violated the terms of that limited —

MR. BICKEL: I mean I've said — then I was waiting for that —

CHIEF JUSTICE GUITTARD: When did you send it?

MR. BICKEL: — to be tried in the so-called declaratory judgment action.

CHIEF JUSTICE GUITTARD: Well, when did you ever in the trial court, in any trial court, call attention to the stipulation as to its limitation with respect to Judge Walker?

MR. BICKEL: Your Honor, I think it was done for several days in May and June.

CHIEF JUSTICE GUITTARD: Well, you then —

MR. BICKEL: — as I recall —

CHIEF JUSTICE GUITTARD: Well then, you then cite it —

MR. BICKEL: — in the so-called Fairway case.

JUSTICE KEITH: We're not going to talk about the Fairway case. We don't have it up here or any part of it.

MR. BICKEL: Well, they're putting me with it, Your Honor.

CHIEF JUSTICE GUITTARD: Well, will you — The only place in your brief that you cite as a matter of record that stipulation, is in — is a citation to the exhibit attached to Mr. Ayres' pleading, that I've been able to find. That's the place that you refer to it.

MR. BICKEL: Well, there's Exhibit 89, Defendant's Exhibit 89 that's there.

CHIEF JUSTICE GUITTARD: Well, you haven't referred us to it.

MR. BICKEL: Well, it's in —

CHIEF JUSTICE GUITTARD: Well —

MR. BICKEL: — the papers we had filed I know, Your Honor.

CHIEF JUSTICE GUITTARD: Well, if you have —

MR. BICKEL: The papers we filed November 30 —

CHIEF JUSTICE GUITTARD: If you have at — If you did at any time before Judge Walker, call that to his attention, that stipulation with respect to his disqualification because of the stipulation concerning a visiting or retired judge, if you did that at any time, would you find that in the record and would you advise us?

MR. BICKEL: Yes.

CHIEF JUSTICE GUITTARD: And it's your recollection now that you did that?

MR. BICKEL: Yes.

CHIEF JUSTICE GUITTARD: Well —

MR. BICKEL: It's further my position, you understand, Your Honor —

CHIEF JUSTICE GUITTARD: Well, why — if you did —

MR. BICKEL: I thought —

CHIEF JUSTICE GUITTARD: Then why don't you — why didn't you in your brief refer us to that part of the record?

MR. BICKEL: Well, the only part of the record I can refer you to is to bear their, the Brownings, initation of the declaratory judgment action, bringing that very stipulation into issue, that was tried.

CHIEF JUSTICE GUITTARD: So they're the only —

MR. BICKEL: I don't know how —

CHIEF JUSTICE GUITTARD: They're the only ones that brought — that presented it there. You didn't present it at all?

MR. BICKEL: Well, as far as I was concerned I could try that issue.

CHIEF JUSTICE GUITTARD: And then —

MR. BICKEL: And when — Or, I mean, it was before the Court.

CHIEF JUSTICE GUITTARD: All right. Then we'd like for you to cite to us whenever you ever raised that in the trial court.

MR. BICKEL: Well, they raised it, and I was going to get to try it. It was on the table before the Court whether or not that stipulation would be obfuscated or not.

CHIEF JUSTICE GUITTARD: As I — as I look at the record, the only manner in which — the only occasion in which the stipulation was before the Court was in their argument as to whether they were entitled to a receivership. And there was — and —

MR. BICKEL: Fine. I mean, there it is. That's the threshold point.

CHIEF JUSTICE GUITTARD: All right. And my question is: Did you at any time point out to the judge that he had no authority to proceed because of the limitation to the stipulation limiting his authority to try it to a visiting or retired judge?

MR. BICKEL: I don't think I did just like that in the absence of the defense of the declaratory judgment —

CHIEF JUSTICE GUITTARD: Well, how did you do it?

MR. BICKEL; — and those contentions. Through defense of a declaratory judgment and those contentions. Also I think I filed a plea in abatement.

CHIEF JUSTICE GUITTARD: Well —

MR. BICKEL: I'm telling you.

CHIEF JUSTICE GUITTARD: You'll cite that for us?

MR. BICKEL: I do think — Yes, Your Honor.

CHIEF JUSTICE GUITTARD: Okay.

MR. BICKEL: And further, it is my position that the bankruptcy law, once an automatic stay is in effect — And I say the stay was in effect — does not require that it be brought to the attention of the trial judge. I say that. I contend that.

JUSTICE WILLIAMS: When you found out that Dee Brown Walker was trying this case, did you go back to the bankruptcy court and say, "Pull that string"?

MR. BICKEL: Yes.

JUSTICE WILLIAMS: You did?

MR. BICKEL: Yes.

JUSTICE WILLIAMS: What did he say?

MR. BICKEL: I didn't, but another lawyer with me went back.

JUSTICE WILLIAMS: Well, what did he say?

MR. BICKEL: They said, "It's just the Fairway case. Leave it there. Go ahead."

JUSTICE WILLIAMS: But it wasn't the Fairway case.

MR. BICKEL: That's what we tried to tell him, Judge, but they wouldn't do it.

I mean, they — Judge Gandy, the bankruptcy judge, wouldn't.

JUSTICE WILLIAMS: Is that in this record?

MR. BICKEL: It's the Fairway — I don't remember.

JUSTICE WILLIAMS: I mean the matter about the bankruptcy judge telling you to go ahead. Is that in this record?

MR. BICKEL: Yes. It's called the abstention order.

JUSTICE WILLIAMS: That's —

MR. BICKEL: I'm positive it is because I have read so much about it in these papers that are before you gentlemen at this time. Mr. Ayres argued the abstention order.

JUSTICE KEITH: You can readily see what we're trying to get at there.

MR. BICKEL: I certainly do, Your Honor.

JUSTICE KEITH: Didn't you waive your complaint that you —

MR. BICKEL: I don't see how I could.

JUSTICE KEITH: — had been making in Judge Sanders —

MR. BICKEL: That was the very point of —

JUSTICE KEITH: If you didn't complain in Judge Walker's court, you've got no business complaining here or in Judge Sanders' court.

MR. BICKEL: I'm in accord, but I did — Well, I say the law does not require me to complain because —

CHIEF JUSTICE GUITTARD: Well then if —

MR. BICKEL: — me being — It's out of the jurisdiction — or the jurisdiction being in the bankruptcy court, the proceedings outside the jurisdiction or the powers granted by that court are a nullity.

CHIEF JUSTICE GUITTARD: The law may not require you to complain, but the law very well may preclude you from any relief in the state courts unless you did.

MR. BICKEL: I'm not talking about that.

CHIEF JUSTICE GUITTARD: I say you may — that as far as the federal law —

MR. BICKEL: — whereby the judgment would be rendered if the court had no jurisdiction.

CHIEF JUSTICE GUITTARD: If so far — if the — If the federal law is that you didn't have to complain in the trial court, in the state court, in order to obtain relief from the judgment in the federal court, if that's the law as Judge Sanders apparently —

MR. BICKEL: Believed it to be.

CHIEF JUSTICE GUITTARD: — believed it to be — And we assume for the purpose of the present hearing that that is the law in the federal court — still it's a question of state law as to whether you're entitled to any — to invoke any relief in the state court by appeal or otherwise if you

didn't make that complaint before our state court. Isn't that a matter of state law?

MR. BICKEL: Yes, it's a matter of state law, but these gentlemen and Judge Walker led me to believe that that's the first thing we were going to decide, to-wit, a declaratory judgment action of whether or not they would be entitled to try this case in state court before Judge Walker despite the stipulation.

CHIEF JUSTICE GUITTARD: Now, where is that in the record?

MR. BICKEL: In their declaratory judgment action which ought to be in the transcript which is early on in the case, Your Honor.

CHIEF JUSTICE GUITTARD: Mr. Bickel, I have read that document — which I think is the document you're talking about — this morning, and I didn't find anything there except a discussion of whether the federal court's order precluded a receivership in the state court. I didn't find any reference to whether or not the judge — the visiting judge or retired judge had to try the case.

MR. BICKEL: Their pleading, Your Honor?

CHIEF JUSTICE GUITTARD: Yes.

MR. BICKEL: Then, you know, I didn't know it was coming up. It's been so long. I may be wrong about it, but my recollection was to the contrary.

CHIEF JUSTICE GUITTARD: Well, if — That's one of the things that I think perhaps you'd better look into the record on and advise us about.

MR. BICKEL: Okay.

CHIEF JUSTICE GUITTARD: Go ahead.

MR. BICKEL: If I can recall where I was, Your Honor.

CHIEF JUSTICE GUITTARD: Uh-huh.

MR. BICKEL: The — Well, I don't recall where I was. Yes. It's been mentioned that we're going to one court and asking one thing and one court for another and this, that and the other. The record ought to be clear that the judgment in federal court rendered by Judge Sanders, which is now on appeal in the Fifth Circuit came about through an action instituted by the Brownings, Mr. Ayres, and not through an action instituted by the Holloway/Humble Trustee.

In reply to the action instituted by Mr. Ayres on behalf of the Brownings the Trustee filed counterpleadings —

JUSTICE KEITH: Well, the Brownings were — Let me interrupt for a moment. The Brownings were simply seeking in it to require you to file a supersedeas bond or to surrender some assets on this judgment that was then final.

MR. BICKEL: That's as I understand it, Judge.

JUSTICE KEITH: Yes, and that's what they wanted.

MR. BICKEL: I did not file —

JUSTICE KEITH: I know.

MR. BICKEL: — I didn't handle the federal court matter and I don't know, but as I understand it, that's correct.

JUSTICE KEITH: That's the way as I remember the record.

MR. BICKEL: I think that's right.

JUSTICE KEITH: And it's your assertion that they city-slicked you some way or another. I've read enough of your pers in this case that I don't believe that you need a guardian in the courtroom.

I don't — the record shows pretty clearly there that — what I saw in there that you —

CHIEF JUSTICE GUITTARD: I —

JUSTICE KEITH: You didn't do much objecting down there in Judge Walker's court.

CHIEF JUSTICE GUITTARD: Parenthetically, we don't believe that Mr. Ayres is a simpleton either, but go ahead.

MR. BICKEL: Well, I can't remember whether I was in federal court or Judge Walker's court, but at any rate — in federal court then Holloway's counsel, Humble's counsel, countered with reference to this jurisdictional business and the upshot of it is the Sanders opinion at this time.

JUSTICE WILLIAMS: Well, you sought this relief Sanders gives, didn't you?

MR. BICKEL: Oh, yes.

JUSTICE WILLIAMS: Well now, did you ever hear of election of remedies? Isn't there something called election of remedies?

MR. BICKEL: But —

JUSTICE WILLIAMS: Do you seek for us —

MR. BICKEL: I think we've argued that last hearing, Judge Williams, and I don't believe so.

CHIEF JUSTICE GUITTARD: We argued that in the context of your federal civil rights.

JUSTICE WILLIAMS: That was before Judge Sanders' opinion.

CHIEF JUSTICE GUITTARD: And we held there wasn't any conflict between the federal civil rights suit and this case, but now this is something a little different.

MR. BICKEL: Well, you —

CHIEF JUSTICE GUITTARD: Don't you see a difference?

MR. BICKEL: I don't see a difference. I think I can contend in any forum that Judge Walker didn't have any juris-

diction and that his judgment is void and I see no inconsistencies.

CHIEF JUSTICE GUITTARD: How can a stipulation affect the jurisdiction of a court?

MR. BICKEL: Because the power, basic power of a body of politic given to anyone — in this case it starts out with the power of the bankruptcy court and it never leaves there expect under certain terms and conditions. If they're violated, then it jumps right back to the bankruptcy court.

CHIEF JUSTICE GUITTARD: And there's no federal court decision before Judge Sanders' was ever held, is there?

MR. BICKEL: I didn't hear you.

CHIEF JUSTICE GUITTARD: I said before Judge Sanders wrote, there wasn't any federal decision that ever held that.

MR. BICKEL: Well, I think — I think it's just implicit in arguing — I couldn't conceive to the contrary. If the federal court had jurisdiction, then that court's jurisdiction —

CHIEF JUSTICE GUITTARD: It could well be the rule that once the federal court has remanded they cannot attach any conditions to their remand. That could well be the law as far as the federal courts are concerned until Judge Sanders wrote. Isn't that right?

MR. BICKEL: It could be.

CHIEF JUSTICE GUITTARD: Okay. Then I have some difficulty seeing why it is so implicit.

MR. BICKEL: Well, it was improperly remanded. It never left the federal court.

If the courts of the State of Texas, because of the terms and conditions placed upon that federal court's remand, were precluded for public policy or whatever reasons, in accepting and handling the case because it interferes with their handling of their judicial business, then the case was never remanded.

CHIEF JUSTICE GUITTARD: All right. Then the case that Judge — That's what in effect Judge Sanders held, that it was the same as if the case had never remanded because it was not tried under the conditions —

MR. BICKEL: That's right.

CHIEF JUSTICE GUITTARD: — of the remand.

MR. BICKEL: That's right.

CHIEF JUSTICE GUITTARD: But then that doesn't affect our question as to whether or not you are entitled to any further relief in the state court if you didn't raise that timely in the state court.

MR. BICKEL: Well, I said overriding everything done, it's the jurisdiction of the federal court, and unless its rules are complied with then anything occurring in state courts is a nullity.

CHIEF JUSTICE GUITTARD: Well, we bow to that. We bow to that.

MR. BICKEL: And so I can't —

CHIEF JUSTICE GUITTARD: We'll bow to that, but the question is whether you are entitled to proceed with this appeal or whether we should dismiss it.

MR. BICKEL: Certainly.

CHIEF JUSTICE GUITTARD: And that's not a question the federal court —

MR. BICKEL: Well, certainly if you conclude that — Well, I'm challenging jurisdiction now in the state courts.

CHIEF JUSTICE GUITTARD: Well, then why shouldn't we dimiss the appeal?

MR. BICKEL: If you believe — You can only dismiss it on the grounds that there's no jurisdiction. If you find there is jurisdiction, then I'm entitled to bring my points of error that occurred in the trial court, Your Honor.

JUSTICE KEITH: In both places, federal court and state court at the same time?

MR. BICKEL: Yes.

JUSTICE KEITH: Isn't there an election of remedies doctrine?

MR. BICKEL: I don't believe so. I think you can take — In fact, to contend differently in a different court would be madness, on a point of jurisdiction and who's got the power. We, of course, contend consistently in both courts.

CHIEF JUSTICE GUITTARD: You're asking us in this case to reverse the judgment of the trial court, right?

MR. BICKEL: Yes.

CHIEF JUSTICE GUITTARD: You're not asking us to dismiss our appeal?

MR. BICKEL: Yes.

CHIEF JUSTICE GUITTARD: You are?

MR. BICKEL: Both.

CHIEF JUSTICE GUITTARD: The case — the appeal is dismissed. That leaves then the order of the trial court in force. If you're asking us to dismiss —

MR. BICKEL: No. I, I, I —

CHIEF JUSTICE GUITTARD: If you're asking us to dismiss the appeal, we'll do it right today.

MR. BICKEL: Your Honor, I ask you to dismiss only on a finding that there's no jurisdiction in the 162nd and thereby in accordance with the Appellate review language send it to the trial court with instructions to dismiss for want of jurisdiction.

CHIEF JUSTICE GUITTARD: That's not dismissal of appeal. That's a reversal.

MR. BICKEL: Well, I didn't — I didn't — I had not intended to convey the idea that I wanted a dismissal to anybody.

CHIEF JUSTICE GUITTARD: All right. If you don't want to dismiss this appeal — I didn't think you wanted a dismissal of the appeal. I just wanted to make you sure you understood what you were asking for if you did — if you said that you wanted one.

MR. BICKEL: I'm trying not to say I want a dismissal.

CHIEF JUSTICE GUITTARD: Okay. Now, is there anything further, Mr. Bickel?

MR. BICKEL: I would merely want to point out that in my view I think that the Sanders ruling of no jurisdiction of Walker precludes this Court taking any action at this time. Because if that decision is upheld, that decision of Judge Sanders — the voidness of the Walker order — is upheld, that in my view is dispositive of the 162nd District Court judgment and this appeal.

So I will ask the Court to stay and do nothing. If this Court believes that the 162nd District Court did not have jurisdiction of the matters for — I will call it the state court reason as distinguished from federal jurisdictional reason — then this Court could remand this case to the 162nd directing that it dismiss the — its judgment.

However, this Court cannot, in my view, make any other decision, because to do so not knowing whether or not the federal court's decision will be reversed or upheld, bringing about — and I probably hear it constantly, and the parties may — they ultimately may be entitled to it as far as the Court is concerned.

We're entitled to appeal if the 162nd District Court in fact is to have jurisdiction of the matter. And we're entitled to dismissal of the 162nd Court, trial court judgment for want of jurisdiction —

CHIEF JUSTICE GUITTARD: You can't dismiss a judgment.

MR. BICKEL: Now wait a minute.

CHIEF JUSTICE GUITTARD: You can't dismiss a judgment. You either reverse a judgment or affirm a judgment. You dismiss a cause.

MR. BICKEL: Well, dismiss a cause.

CHIEF JUSTICE GUITTARD: Okay.

MR. BICKEL: So in the event that the Fifth Circuit upholds the Sanders' decision, United States Supreme Court either upholds it or grants certiorari.

JUSTICE WILLIAMS: Did the Fifth Circuit set this for hearing?

MR. BICKEL: Not that I know of, Your Honor. In fact, I don't think that the Humble/Holloway briefs are due until Monday or Tuesday or Wednesday or something like that.

CHIEF JUSTICE GUITTARD: Anything further?

MR. BICKEL: No, sir.

* * *

APPENDIX 3

NO. 05-82-01378-CV

IN THE COURT OF APPEALS
FOR THE FIFTH SUPREME JUDICIAL DISTRICT
OF TEXAS
AT DALLAS

HUMBLE EXPLORATION COMPANY, INC., et al.,
Appellants

vs.

JANE H. BROWNING, et al.,
Appellees

Appealed From The District Courts of
Dallas County, Texas

193rd Judicial District Court
(with Honorable Fred Harless, presiding)
VOLUME ONE

Judgment After Trial
May 3-May 12, 1982

162nd Judicial District Court
(with Honorable Dee Brown Walker, presiding)
VOLUMES TWO
AND THREE

Judgment After Trial
July 6-August 20, 1982

BRIEF FOR APPELLANTS
VOLUME TWO

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POINT OF ERROR NO. 15 (RESTATED)

THE JUDGMENT SIGNED AUGUST 26, 1982 AND ALL PRIOR PROCEEDINGS THEREUNDER ARE VOID AND SHOULD BE SET ASIDE BECAUSE THE 162ND JUDICIAL DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION. (Tr. 1421).

POINT OF ERROR NO. 16 (RESTATED)

THE TRIAL COURT LACKED JURISDICTION TO ALLOW THE BROWNINGS TO SEEK ANY RELIEF IN THE 162ND JUDICIAL DISTRICT COURT BECAUSE TO DO SO VIOLATED THE EXPRESS TERMS OF THE "STIPULATION AND AGREEMENT ON MANNER IN WHICH CONTROVERSY SHALL BE HEARD, DETERMINED AND LIQUIDATED." (Tr. 864 at 878).

POINT OF ERROR NO. 17 (RESTATED)

THE TRIAL COURT LACKED JURISDICTION TO GRANT THE BROWNINGS AN IMMEDIATE DECLARATORY JUDGMENT BECAUSE APPELLANTS WERE ENTITLED TO A JURY TRIAL AFTER DEMANDING SAME. (Rec.S.F. 1065) (Tr. 1045).

POINT OF ERROR NO. 18 (RESTATED)

THE TRIAL COURT ERRED IN GRANTING THE BROWNINGS' APPLICATION FOR IMMEDIATE DECLARATORY JUDGMENT BECAUSE THE TEXAS DECLARATORY JUDGMENT ACT CANNOT BE USED TO CONSTRUE A COURT ORDER.

POINT OF ERROR NO. 19 (RESTATED)

THE TRIAL COURT ERRED IN ALLOWING EXPEDITED AND SUBSTITUTED SERVICE OF PROCESS ON "CROSS-DEFENDANTS AND THIRD-PARTY DEFENDANTS" BECAUSE IT VIOLATED TEX.R.CIV.P. 106 AND 695.

ARGUMENT AND AUTHORITIES UNDER POINTS OF ERROR NO. 15 THROUGH 19

A threshold issue of the appeal of the August 26 judgment is whether the 162nd Judicial District Court had subject matter jurisdiction of the Brownings' cause of action. The determination of the fundamental validity of the trial court's proceedings lies in the Stipulation and Agreement of January 17, 1980, approved by the Bankruptcy Court. (Tr. 878). The Stipulation clearly states the Brownings agreed to litigate their claims against Appellants before a specific retired or visiting judge agreed upon by both sides in the 193rd Judicial District Court and further that the Brownings would not seek a receivership or injunction.

In disregard of the Stipulation, the Brownings filed a declaratory judgment action in the 162nd Judicial District Court to construe and avoid the Stipulation. Such action necessarily involves construction of the Bankruptcy Court's Order of Abstention of June 4 which provides, in part: "... that this Court abstains in favor of the *courts* of the State of Texas with regard to the litigation now pending as Cause No. 82-5742-I in the 162nd District Court ..." (Tr. 864, emphasis added). Appellants objected to the trial court's assuming jurisdiction to construe this Bankruptcy Court Order, because among other reasons such order related to the Fairway claims then pending in the 162nd Judicial District Court, *at a time when the Brownings' cause was not before the 162nd Judicial District Court.* (Rec.S.F. 822). To the contrary, their identical cause of action was pending in the 193rd Judicial District Court as stated in their pleadings. (Tr. 864). Counsel for the Brownings stated: "I represent to the Court that that Order expressly vests this Court with jurisdiction ..." (Rec.S.F. 822).

Thus, the Brownings improperly utilized the Declaratory Judgment Act for purposes of asking the trial court to interpret an Order of the Bankruptcy Court, constituting reversible error. *Speaker v. Lawler,* 463 S.W.2d 741 (Tex.Civ.App. - Beaumont 1971, writ ref'd, n.r.e.).

In *Speaker*, the court held:

> "We have concluded that a litigant cannot use Article 2524-1 for the purpose of asking a trial court to interpret a prior judgment entered by that or another court. We feel the approval of such a procedure would literally open "Pandora's Box" and permit, among other things, a new type of re-trial of the same issues or a new method of review of the prior judgment."

When the trial court does not have jurisdiction to act, the proper practice for the appellate court is not to dismiss the appeal but to reverse the trial court's order, and remand the cause with the direction that it be dismissed. *Martin v. Commercial Standard Fire & Marine Ins. Co.*, 505 S.W.2d 799 (Tex. 1971); *Fruit Dispatch Co. v. Rainey*, 111 Tex. 266, 232 S.W. 281, 282 (1921); TEX.R.CIV.P. 434.

"The declaratory judgment action cannot be invoked for the determination of procedural rules or rights . . . in a pending suit. The reason . . . is that such questions should be determined by the Court in which such action is pending or is to be filed." *Railroad Commission v. Houston Natural Gas Corp.*, 186 S.W.2d 117, 124 (Tex.Civ.App. — Austin 1945, writ ref'd w.o.m.).

The Order resulting from the declaratory judgment suit recites forty-seven findings of fact and conclusions of law as to the merits of the Brownings' action as well as the merits of the underlying constructive trust case. (Tr. 1045). There is a fundamental question of jurisdiction of the 162nd Judicial District Court to entertain the declaratory judgment claims of the Brownings, thus testing the validity of the entire proceedings. In response to the initiation of these claims, Appellants immediately filed Pleas in Abatement raising the subject matter jurisdiction of the trial court. (Tr. 763, 900, 984, 1109) (argued under Point of Error No. 10). Appellants' pleadings alleged and established that the Brownings' identical cause of action was pending in the

193rd Judicial District Court with Judge Harless presiding, and set for jury trial in September, 1982. (Set.S.F. 1771). The pleas were summarily overruled (Tr. 336, 338) in direct contravention of Texas law, rendering the trial court's subsequent orders void. *Curtis v. Gibbs,* 511 S.W.2d 263 (Tex. 1974); *Cleveland v. Ward,* 116 Tex. 1, 285 S.W. 1063 (1926); *Conn v. Campbell,* 245 S.W.2d 813 (Tex. Comm'n App. 1930, opin. adopted).

In *Continental Oil Co. v. P.P.G. Industries,* 504 S.W.2d 616 (Tex.Civ.App. - Houston [1st Dist.] 1973, writ ref'd, n.r.e.), the court was presented with a plea in abatement in response to a declaratory judgment action. The Houston court quoted the applicable rule found in *Texas Liquor Control Board v. Canyon Creek Land Corp.,* 456 S.W.2d 891 (Tex. 1970):

> " . . . As a general rule, an action for declaratory judgment will not be entertained if there is pending at the same time it is filed, another action or proceeding between the same parties and in which may be adjudicated the issues involved in the declaratory action . . . "

Therefore, the right of the Brownings to seek relief in the 162nd Judicial District Court constituted the adjudication of the merits of a declaratory action by a court without jurisdiction.

When the trial court improperly assumed jurisdiction, Appellants immediately demanded a jury trial of the fact issues and paid a jury fee. (S.F. 943, 1061-4). The trial court refused their jury demand, which rendered any further proceedings invalid. TEX.CONST. art. I, §15; art. V, §10. Our Supreme Court has held that the mere denial of the constitutionally protected right to trial by jury raises an inference of probable harm under both Rules 434 and 504 so as to require reversal of the trial court's judgment. *Texas Pacific Railway Company v. Van Zandt,* 317 S.W.2d 528, 531 (Tex. 1958).

The law is clear that the right to a jury trial exists in proceedings under the Declaratory Judgment Act. *Continental Oil Company v. P.P.G. Industries,* 504 S.W.2d 616 (Tex.Civ.App. - Houston [1st Dist.] 1973, writ ref'd, n.r.e.), *Hatten v. City of Houston,* 373 S.W.2d 525 (Tex.Civ.App. - Houston 1963, writ ref'd, n.r.e.). The Uniform Declaratory Judgment Act, TEX.REV.CIV.STAT.ANN.Art, 2524-1, Section 9 provides:

> "When a proceeding under this Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the Court in which the proceeding is pending."

Consequently, the trial court erred as a matter of law in assuming jurisdiction to: construe the June 4 Order of the Bankruptcy Court (Tr. 1399); to interpret the Brownings' rights under the Stipulation and Agreement, approved by Order of the Bankruptcy Court (Tr. 864 at 878); and further committed reversible error in refusing Appellants' jury demand. (S.F. 943).

The trial court also erred in entering judgment on the merits of the declaratory judgment action in a temporary hearing. (Tr. 344). This procedure has been declared improper by the Supreme Court of Texas. *Houston Belt & T. Ry. Co. v. Texas & New Orleans R. Co.,* 289 S.W.2d 217 (Tex. 1956). In *Houston Belt,* declaratory judgment claims were presented and ruled upon in a hearing for temporary injunction. The construction of a prior contract between the litigants was a threshold issue, as in the case at bar. Proper objections were made that the court was without authority to convert the hearing into a trial on the merits. The question in the case *sub judice* is the court's jurisdiction to act *before* a trial on the merits of the constructive trust case could be had.

A court "will not grant declaratory judgment if the same issues between the same parties (are) involved in another cause pending at the time of the filing of the declaratory

proceedings." *Pickens v. Hidalgo County Water Control & Improvement District,* 284 S.W.2d 784 (Tex.Civ.App. — San Antonio 1955, no writ). Furthermore, when a plaintiff's cause of action might be enforced by seeking direct relief, declaratory judgment is improper. *Southern Traffic Bureau v. Thompson,* 232 S.W.2d 742, 750 (Tex.Civ.App — San Antonio 1950, writ ref'd n.r.e.).

Our courts are not authorized to enter declaratory judgments unless it ends the controversy. *Joseph v. City of Ranger,* 188 S.W.2d 1013 (Tex.Civ.App. — Eastland 1945, writ ref'd w.o.m.). Of course, this did not occur in the case at bar. The Brownings' use of the declaratory judgment action was to determine if they were properly in Judge Walker's court, and if they could proceed for extraordinary relief and a trial. (Tr. 864).

Therefore, Judge Walker committed reversible error in improperly ruling on the Brownings' claims as to their right to seek any relief in the 162nd Judicial District Court. The Brownings' claims were unliquidated and based upon theories of constructive trust which were set for trial in the 193rd court, the court of dominant and exclusive jurisdiction.

Service of Process

The manner of service on all cross-defendants and third party defendants constituted an abuse of TEX.R.CIV.P. 106(b) and TEX.R.CIV.P. 695. Rule 106(b) provides:

> "The court may authorize service . . . in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit."

In order to utilize this provision of Rule 106, a strict compliance thereof is required. The Brownings did not establish that personal service upon any cross-defendants or third party defendants was impracticable as required by law.

Stylemark Construction, Inc. v. Spies, 612 S.W.2d 654 (Tex.Civ.App. - Houston [1st Dist.] 1981, no writ).

The trial court further erred in allowing the Brownings to serve various cross-defendants and third party defendants by serving attorneys for Humble. Absent the defendant's explicit authorization for an attorney to accept service, the trial court does not gain personal jurisdiction over the defendant. *H. L. McRae Co. v. Hooker Construction Co.,* 579 S.W.2d 62 (Tex.Civ.App. - Austin 1979, no writ). Humble's counsel objected to this manner of service and refused to accept service of process (Rec.S.F. 842). The trial court has no discretion to authorize later a mode of service not authorized when made. *Grasz v. Grasz,* 608 S.W.2d 356 (Tex.Civ.App. - Dallas 1980, no writ). Having wholly failed to comply with the mandatory requirements of substituted service, the trial court acquired no personal jurisdiction over the parties which would constitute the required statutory three days' notice to defendants, pursuant to TEX.R.CIV.P. 695.

In summary, the trial court erred in:

(1) assuming jurisdiction to construe an Order of the United States Bankruptcy Court; (Tr. 1045, 864 at 878);

(2) entertaining and granting a declaratory judgment action, without a jury trial or a non-jury trial of the merits of such action; (Tr. 1045);

(3) converting a temporary hearing into a trial on the merits of a declaratory judgment, to determine if the court had jurisdiction.

Because the trial court lacked jurisdiction of the matter, the August 26 Judgment should be reversed and remanded with instructions to dismiss the Brownings' suit.

POINT OF ERROR NO. 20 (RESTATED)

JUDGE WALKER ERRED AS A MATTER OF LAW IN FAILING TO RECUSE HIMSELF.

POINT OF ERROR NO. 21 (RESTATED)

JUDGE WALKER ERRED IN RULING UPON APPELLANTS' MOTION TO RECUSE AND INCLUDING WITHIN THE ORDER OF REFERRAL AN ADMONITORY INSTRUCTION.

POINT OF ERROR NO. 22 (RESTATED)

THE TRIAL COURT, JUDGE MORRIS ROLSTON PRESIDING, ERRED AS A MATTER OF LAW IN OVERRULING APPELLANT'S MOTION TO RECUSE.

POINT OF ERROR NO. 23 (RESTATED)

THE FAILURE BY JUDGE WALKER TO RECUSE HIMSELF OPERATED TO DEPRIVE APPELLANTS OF PROCEDURAL DUE PROCESS, AS GUARANTEED BY THE CONSTITUTIONS OF THE STATE OF TEXAS AND OF THE UNITED STATES.

POINT OF ERROR NO. 24 (RESTATED)

THE FAILURE BY THE TRIAL COURT TO GRANT THE MOTION TO RECUSE OPERATED TO DEPRIVE APPELLANTS OF PROCEDURAL DUE PROCESS, AS GUARANTEED BY THE CONSTITUTIONS OF THE STATE OF TEXAS AND OF THE UNITED STATES.

ARGUMENT AND AUTHORITIES UNDER POINTS OF ERROR 20 - 24

On June 25, 1982, Appellant filed, pursuant to Rule 18a of the Texas Rules of Civil Procedure, a motion wherein Appellants requested Judge Walker to recuse himself or to refer the motion pursuant to said rule and TEX.REV.CIV.STAT. Art. 200(a) (Tr. 1098). The motion was founded on Appellants' rights under the constitution and laws of the United States and of the State of Texas to have their case heard and adjudicated by a fair and impartial judge in a manner consistent with the requirements of

procedural due process and the canons of the Code of Judicial Conduct. Appellants specifically urged in their motion that, in the instant case, the impartiality of Judge Walker might reasonably be questioned on grounds including his initiating and entertaining numerous *ex parte* conferences with opposing counsel, his apparent pre-judgment of material fact issues in the case on the basis of *ex parte* communications, his entry of numerous orders in complete derogation of Appellants' rights to procedural due process, and his past and present relationship with opposing counsel, certain of whom had a financial interest in the lawsuit.

Notwithstanding the explicit directives contained in Rule 18(a), on January 28, 1983, rather than recuse himself or refer the case for hearing, Judge Walker entered an order reciting consideration of the motion and expressly ruling that the motion was without merit (Tr. 1135). The order further directed referral to the presiding judge with the admonition that: "a portion of this cause is set for trial on its merits for July 6, 1982." (Tr. 1135 LL 17-18).

Judge Morris Rolston was subsequently assigned to hear the motion, which was set for hearing on July 1, 1982.[1]

At the hearing, Appellants introduced evidence, which as described hereinafter was largely undisputed, showing: (i) that up to the time of hearing, Judge Walker had followed a consistent pattern of entering orders without notice to Appellants and without hearing; (ii) that certain of these orders followed or grew out of admitted ex parte communications; (iii) that the trial court held on a daily basis *ex parte* conferences with opposing counsel, and in particular, with counsel for the Brownings; (iv) that the Court had conducted an extra-judicial investigation of material facts in

[1]It is not apparant from the Transcript or Statement of Facts who set the matter for hearing. Judge Rolston operated throughout the hearing on the misconception, likely gained from Judge Walker's admonitory instruction, that he necessarily had to rule prior to the July 6, 1982 setting. (S.F. 124-125; 138 *11* 2-4).

dispute between the parties pending before it; and (v) that Judge Walker had been represented in his individual and judicial capacity on numerous occasions by counsel for the Brownings and by counsel for certain of the other opposing parties.

Appellants attempted to introduce evidence on the close business and personal relationship between and among the judge, counsel for the Brownings, the receiver, counsel for the receiver, and certain of the counsel for Participants, arising, in part, from their joint tenure on the County Law Library Committee and, upon Judge Walker's resignation therefrom, from their formation and operation of the Dallas County Bar Association. This evidence was improperly excluded by the trial court on the grounds that it was immaterial. (S.F. 207).[2]

Immediately upon completion of the testimony, the trial court ruled from the bench and, as a matter of law, denied the motion. (Recusal S.F. 166 *11* 13-14; Tr. 1155). Although proper request was made therefor (Tr. 1231), the trial court declined to enter findings of fact or conclusions of law.

Appellants submit, that for the reasons set forth hereinafter, Judge Walker erred as a matter of law in ruling upon the motion and in failing to recuse himself *instanter* and that the trial court assigned to hear the motion applied the wrong standard in ruling upon it and erred in denying it. Appellants further submit that said actions of the trial court, acting through Judge Walker and through Judge Morris Rolston, operated to deprive Appellants of their rights to procedural due process, as guaranteed by the Constitution of the United States and of the State of Texas.

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[2]From July 1-2, 1982 hearing on Motion to Recuse. Hereafter references to the Statement of Facts from the hearing will be designated "Recusal S.F. ___".

I.

JUDGE WALKER ERRED AS A MATTER OF LAW IN CONSIDERING AND OVERRULING APPELLANTS' MOTION TO RECUSE.

Rule 18a(c) of the Texas Rules of Civil Procedure provides that after the filing of a motion to recuse and prior to any further proceedings in the case: "the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion."

Rule 18a(d) in turn provides, in relevant part, that: "if the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy an order of referral, the motion and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and *shall take no further action* in the case after filing of the motion and *prior to a hearing on the motion.*" (emphasis added). Thus, under the express provision of the rule, the judge must either recuse himself *instanter* or refer the case. In the case at bar, Judge Walker did neither; rather, he entered an order, citing consideration of the motion and expressly ruling it to be "without merit." Judge Walker further included within his order an admonitory instruction that the case was pending on July 6, 1982. Appellants submit that Rule 18a permits the court but one of two actions; either to recuse himself or to refer the case for hearing by the presiding judge or his designee. The rule is clearly and precisely tailored to avoid the very circumstance presented herein, namely the prejudice that may result from a "preruling" on the motion by the judge made subject thereto.

II.

BOTH THE CONSTITUTION OF THE UNITED STATES AND THAT OF THE STATE OF TEXAS DICTATE THAT A COURT SHALL RECUSE HIMSELF IN ANY CASE WHEREIN HIS IMPARTIALITY MIGHT REASONABLY BE QUESTIONED.

Prior to the effective date of the Code of Judicial Conduct on September 1, 1974, the grounds for disqualification of

judges in Texas were limited to the three grounds prescribed in Sections 11 of Acticle 5 of the Texas Constitution, in Article 15 of the Texas Civil Statutes, and in Article 30.01 of the Texas Code of Criminal Procedure. The stated grounds dictated disqualification in instances in which the judge had: (1) an interest in the case, (2) a prohibited relationship to a party; or (3) acted as counsel in the case. Under these provisions, which were held to be both inclusive and exclusive, *Chilicote Land Company v. Houston Citizens Bank and Trust Company*, 525 S.W.2d 941 (Tex. Civ. App. - El Paso 1975, no writ), neither bias nor the appearance of bias was a ground for disqualification.

However, under the due process clause of the United States Constitution, the United States Supreme Court had developed, as a matter of procedural due process, a body of law which dictated a stricter and higher standard than that required by the various state constitutions, statutes and decisions. The Supreme Court held that due process dictates that: "justice must satisfy the appearance of justice," *Offutt v. United States*, 348 U.S. 11, 14. In *Tumey v. Ohio*, 273 U.S. 510, 532, the United States Supreme Court prescribed that "every procedure which would offer a possible temptation to the average man as judge . . . not to hold the balance nice, clean and true between the State and the accused, denies the latter due process of law." In *In re Murchison*, 349 U.S. 133 (1955), the Supreme Court stated that "such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice between contending parties."

In view of the Supreme Court's pronouncements on the requirements of due process, the Texas Supreme Court in 1974 promulgated the Code of Judicial Conduct, and in the same year Congress enacted 28 U.S.C. § 455(a). Both Canon 3c of the Texas Code of Judicial Conduct and 28 U.S.C. § 455(a) require, in identical language, the disqualification of a judge in any "proceeding in which his *impartiality might reasonably be questioned* . . ." (Emphasis added).

Canon 3C of the Code of Judicial Conduct provides, in relevant part, as follows:

> "C. Disqualification (Art. B, Sec. 11, Texas Constitution; Art. 15 V.A.T.S.; C.C.P. art. 30.01).
>
> "(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including, but not limited to, instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .
>
> (c) he knows that he . . . has . . . (an) interest that could be substantially affected by the outcome of the proceeding."

In *McLeod v. Harris*, 582 S.W.2d 772 (Tex. 1979), the Texas Supreme Court pointed out that Article 5, Section 11 of the Texas Constitution, relating to disqualification, has been "implemented" by Canon 3C of the Code of Judicial Conduct. The Court further ruled that mandamus lies to enforce compliance with Tex.Rev.Civ.Stat., Art. 200a(6), which provides, in relevant part, that "a district judge shall request the presiding judge to assign a judge of the administrative district to hear any motions to recuse such district judge from a case pending in his court." Thus, the Texas Supreme Court clearly indicated the applicability of Canon 3C of the Code of Judicial Conduct as a measure by which to judge the necessity for recusal.

In *Shapley v. Texas Department of Human Resources*, 581 S.W.2d. 250 (Tex.Civ.App. — El Paso 1979), the court stated as follows:

> "Prior to the effective date of the Code of Judicial Conduct on September 1, 1974, the grounds enumerated by the Constitution were held to be both inclusive and exclusive and mere bias and prejudice were not disabling factors. (case cited). *Now under the code, the subject of a disqualification has been broadened and the direction has been made that a judge should disqualify*

himself in a proceeding in which his impartiality might reasonably be questioned." (emphasis added).

Similarly, in *Robb v. Robb,* 605 S.W.2d 391 (Tex.Civ.App. — El Paso 1980, no writ), the court, after discussing several earlier decisions holding that the limited grounds for disqualification specified in the Texas Constitution were both "inclusive and exclusive" and that "mere prejudice and bias are excluded as a disabling factor" recognized that: "All of this has now been changed by the Supreme Court's decision in *McLeod v. Harris.*" While expressing some discomfiture with the expansion of the grounds for recusal, the court in *Robb* expressly held that it was bound by the decision of the Supreme Court.

In *Manges v. Garcia,* 616 S.W.2d 380 (Tex.Civ.App. — San Antonio 1981, no writ), the court rejected the "duty to sit" concept of older cases which held that unless the judge was disqualified under one of the three grounds specified in Section 11 of Article 5 of the Constitution, he could not be disqualified and had a duty to sit. The court stated:

> "Canon 3C (1)(a) of the Code of Judicial Conduct provides that a judge should disqualify himself in a proceeding in which his impartiality 'might reasonably be questioned' if 'he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.'
>
> "It is clear that Canon 3C (1)(a) contemplates that a judge's refusal to sit may be based on a reason not included in the disqualifying grounds enumerated in the Constitution, and it is this expansion of the Constitutional statement of disqualifying factors which was condemned in *Robb* as an amendment of the Constitution by a judicial fiat."

The court goes on to point out as follows:

> "One of the hallmarks of our system of justice is the constant attempt to prevent even the probability of unfairness. To attain this goal the courts have identified various circumstances which point to the conclu-

> sion that the possibility of actual bias of the adjudicator is too high to be constitutionally tolerable. The application of this principle is not limited to cases in which the decision maker has an 'interest' in the result. It is applicable to cases where the judge has been the target of personal abuse or criticism from the party before him." Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L. Ed. 2d 712 (1975). Although the majority of cases in which the principle has been applied involve criminal prosecutions, the fact that, as recognized in Larkin, the rule applies to hearings before administrative agencies supports the conclusion that it is applicable to civil cases. There is no reason to conclude that our elementary notions of fairness are inapplicable to civil cases." 616 S.W.2d at 382.

Thus, from the foregoing it is abundantly clear that pursuant to Canon 3C of the Code of Judicial Conduct, a judge *must* disqualify himself in any case in which his impartiality might reasonably be questioned. The effect of this development is to substitute for the subjective standard of the earlier law an objective standard and to broaden the grounds for disqualification to include instances of situations which might lead a reasonable man to question the impartiality of the judge.

The evolution of the state law in this respect is mirrored in the amendment of 28 U.S.C. § 455 and in the cases construing the amended statute. These cases, and the express language of Canon 3C, aid in defining facts material to the determination. Appellants would submit that each of the following grounds, amply supported by evidence introduced at the hearing, mandate Judge Walker's recusal.

A. Personal Knowledge of Disputed Evidentiary Facts.

At the hearing before Judge Rolston, Appellants introduced uncontradicted testimony that one of the fundamental facts in dispute in the hearing before Judge Walker was the nature of the formation in which certain wells were

drilled and the effect of shutting in the wells on the wells themselves and the formation (Recusal S.F. 235-236). Appellants further introduced into evidence before Judge Rolston the following pronouncement of Judge Walker:

> "The Court: I'll give it to you. I wasn't being facetious when I put it like that. They say they have got a hundred fifty million, that's this bunch over here, and I made an investigation about this Austin Chalk, too, about somebody that knows about it. Said might never get them back on. They are not any good to start with. That's what this person told me.
>
> "Mr. Keahey: We may well want to put our side of that story by proof, and if so, we will ask the court for a hearing in that regard." (Recusal S.F. 246).

Canon 3C (1)(a) expressly includes as a grounds for disqualification any instance where the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding." In the quoted portion from the Statement of Facts, the judge indicated unquestionably his personal knowledge of disputed evidentiary facts. For this reason alone, the Court should have recused himself from further hearings in the case.

B. Personal Bias or Prejudice.

Canon 3C further expressly holds that a court should recuse himself in instances where he "has a personal bias or prejudice concerning a party." Appellants introduced into evidence before Judge Rolston, a portion of the prior proceedings wherein Judge Walker stated "I hope that — it has come to my attention, Mr. Allums, Mr. Holloway (one of the Appellants) is making threats and this, that and the other out there about the judge and this, that and the other." (Recusal S.F. 248). By so stating, Judge Walker clearly has evidenced a bias or a prejudice, based on extra-judicial sources, against one of the parties to the suit. In *Withrow v. Larkin,* 421 U.S. 35, 47 (1975), the court held:

> "The courts have identified various circumstances which point to the conclusion that the possibility of

> actual bias of the adjudicator is too high to be constitutionally tolerable. The application of this principle is not limited to cases in which the decision maker has an 'interest' in the result. *It is applicable to cases where the judge has been the target of personal abuse or criticism from the party before him.*"

Moreover, Appellants introduced into evidence before Judge Rolston the fact that the trial court had, during the pendency of proceedings before it, invited certain of the Brownings into chambers. (Recusal S.F. 243). For this independent reason, the Court should have disqualified himself.

C. Ex Parte Communications.

In *Occidental Petroleum Corporation v. Chandler*, 303 F.2d 55 (10th Cir. 1962), the court held the district judge to be disqualified after making the following finding and conclusion:

> "The judge has conducted closed door hearings, meetings and discussions in chambers at which some but not all of the interested parties were present at the invitation of the judge that the fact of such proceedings and the matters which transpired therein should not be reported to those attorneys."

At the hearing before Judge Rolston, Appellants introduced evidence in the form of excerpts from various of the hearings before Judge Walker which disclosed numerous *ex parte* communications. For example, Appellants introduced the following interchange arising after Appellants were handed an order entered without notice and hearing. When the judge was questioned by Appellants as to the circumstances under which the order was entered, Mr. Kelsoe stated in the record that "Your Honor called Judge Gibbs and talked to him and told him about the situation and Judge Gibbs told you that he would set the order aside." When questioned as to where he derived this knowledge, Mr. Kelsoe stated: "His Honor told me that around 10:00 o'clock or 10:30 Saturday morning. To which the Court responded, "I called him Friday night . . . and told him the situation, told Kelsoe about it." (Recusal S.F. 251-252).

Appellants introduced other incidents in which Judge Walker indicated on the record the fact of *ex parte* communications (Recusal S.F. 247; 248; 250; 255). Counsel for Appellants testified without contradiction, to a consistent pattern of *ex parte* conferences (Recusal S.F. 215-216; 240). Moreover, Jack Ayres, counsel for the Brownings, necessarily admitted being privy to an *ex parte* communication between Snodgrass and Walker, stating: "That was the argument that he made. Judge Snodgrass said 'Why on earth should we have two trials?' I said he said that. This is what he and Judge Walker talked about. Why should we have two trials involving the same identical facts in separate courts? Why should we? Why should we do that? Since the evidence is going to be the same in both courts, why should I do that?" (Recusal S.F. 112). Moreover, with respect to an order jointly entered by Judge Snodgrass and Judge Walker, without notice to Appellants or an opportunity to be heard, the same counsel admitted being directed to draw the order by Walker under circumstances where opposing counsel was not present. (Recusal S.F. 320-321). Further, in testimony, counsel for the Brownings admitted the fact of conversations with the Judge wherein counsel for Appellants were not present. (Recusal S.F. 300). The consistent pattern of *ex parte* conferences between the judge and counsel for the Brownings destroyed any appearance of impartiality and thus constitutes grounds for disqualification.

D. Representation of Judge Walker.

Numerous cases construing the similar language of 28 U.S.C. § 455(a) have held that the fact of prior representation of the judge by a party's attorney might lead a reasonable person to question the impartiality of the judge. Thus, in *Smith v. Sikorsky Aircraft, et al.*, 420 F.2d 61 (C.D. Cal. 1976), the district judge held himself to be legally disqualified under the amended 28 U.S.C. § 455(a) and a virtually identical Canon 3C of the federal Judicial Code solely by virtue of the fact that the firm of attorneys representing plaintiff had associated as counsel in another case another attorney who had, 10 years earlier, represented the judge in

a personal matter before he became a judge and had also, 5 years earlier, represented the judge in his judicial capacity in a mandamus proceeding. Recusing himself, the Court stated:

> "Because of the aforesaid, the undersigned judge, although he expressly finds that he has no personal bias or prejudice concerning any party herein or any personal knowledge of disputed evidentiary facts, and does not have any other personal interest in the proceedings herein which would tend to disqualify him, nevertheless finds that his 'impartiality might reasonably be questioned . . .' "

In the instant case, counsel for the Brownings stipulated to the fact that he had represented the judge in his personal capacity (Recusal S.F. 148, 163). Moreover, Appellants introduced evidence showing that the same counsel had represented the judge in his judicial capacity on several occasions, and introduced evidence tending to show that said counsel was presently representing the judge. (Recusal S.F. 152, Exhibits Dx. 11 19), (Recusal S.F. 167). In *Potashnick v. Port City Construction Company,* 609 F.2d 1101 (5th Cir. 1980) the Court found that, when taken with the other circumstances involved, the fact that the judge was being represented, albeit only nominally, in other litigation by an attorney in the case was grounds for disqualification. In so holding the Court stated:

> "Clearly the goal of the judicial disqualification statute is to foster the appearance of impartiality."

The Court went on to note:

> "Because 28 U.S.C. § 455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word 'might' in the statute was intended to indicate that disqualification should follow

if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality."

Appellants introduced before Judge Rolston evidence which showed not only representation of the judge by both of the counsel for the Brownings, but also by one of the counsel for the participants, by the counsel for the receiver, and by the receiver himself. (Recusal S.F. 148-163, Exhibits Dx. 14-20). Moreover, Appellants attempted to introduce evidence showing the close inter-relationship of these parties and the judge. This evidence was clearly material to the determination of whether a reasonable man might question the impartiality of the judge and was improperly excluded.

Other cases have required disqualification of the judge where one of the attorneys representing a party before the judge had represented the judge. *See, e.g., Rapp v. Van Dusen,* 350 F.2d 806 (3rd Cir. 1964), wherein the court required disqualification of the judge where one of the attorneys had represented the judge in a mandamus proceeding, i.e., in his judicial capacity; *Texaco, Inc. v. Chandler,* 354 F.2d 655 (10th Cir. 1966), wherein the Court held that where one of the attorneys in the case represented the judge in a separate damage suit, the judge was disqualified. Thus, the fact of repeated representation by opposing counsel of the judge both in his personal and judicial capacity represents an instance where the impartiality of the judge must be questioned. Accordingly, for this independent ground, Judge Walker should have recused himself and the motion for recusal should have been granted.

E. Consistent Pattern of Ex Parte Orders.

At the hearing before Judge Rolston, Appellants introduced through excerpts of the Statement of Facts from prior hearings before Judge Walker, and through testimony, the fact that the judge had entered numerous orders without according Appellants the basic rudiments of due process. (Recusal S.F. 132-145). Appellants further testified that cer-

tain of these orders issued immediately after ex parte conferences (Recusal S.F. 140), and counsel for plaintiffs admitted at least one instance in which an order entered without notice or hearing arose directly from an ex parte communication between said counsel and the judge. (Recusal S.F. 250). Appellants submit that a consistent pattern of ex parte orders demonstrate, conclusively, an instance where the impartiality of the judge might reasonably be questioned.

Appellants submit that each of the foregoing matters calls into question the impartiality of Judge Walker, and thus, under applicable law constitutes an independent ground for disqualification. Moreover, the cumulative effect of the foregoing can leave no question as to whether or not a reasonable man might question the impartiality of the judge. Accordingly, the overruling of the motion constitutes a clear abuse of discretion. This Court, on this independent basis, should reverse and remand the case with directions that the trial court enter an order granting Appellant's Motion to Recuse.

* * *

APPENDIX 4

NO. 82-5742-I

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
162ND JUDICIAL DISTRICT

FAIRWAY LAND COMPANY, et al.,

vs.

HUMBLE EXPLORATION COMPANY, et al.,

vs.

JANE H. BROWNING, et al.

MOTION TO RECUSE

COME NOW Humble Exploration Company, Inc., Pat S. Holloway, Hollway Exploration Corporation and Sterling Pipeline Company, (hereinafter "Movants") and move this Court to recuse himself, or, alternatively, in the event that this Court declines to do so, that he make proper and immediate request under TEX.REV.CIV.STAT.ANN. Art. 200a and Rule 18a of the Texas Rules of Civil Procedure of the presiding judge of the first administrative judicial district that the presiding judge hear, or assign another judge of the administrative district to hear this motion, and in support thereof would show the court as follows:

I.

Movants would show this Court that they presently have on file herein Pleas of Privilege and Pleas in Abatement wherein they assert that this Court has no jurisdiction to proceed in either the action brought by Fairway Land Company, *et al.* or the cause of action attempted to be brought herein by the Browning Interests. With respect to the latter action, this Court has previously overruled Movants' Pleas in Abatement and has set the matter for trial on July 6, 1982. This Court has yet to set for trial before a jury

Movants' Plea of Privilege. Without in any way waiving their claim that this Court has no jurisdiction to proceed, Movants request that this Court recuse himself in both matters.

II.

Under the Constitution and laws of the State of Texas and of the United States, Movants have the right to have their case heard and adjudicated before a judge who is fair and impartial and who conducts his proceedings in accordance with the various canons of the Code of Judicial Conduct. Under Canon 3c of the Code this Court should disqualify himself in situations where his impartiality may reasonably be questioned. Canon 3c provides in relevant part as follows:

> "(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including, but not limited to, instances where:
>
> (a) He has a personal bias or prejudice concerning a party, . . .
>
> (c) Or any other interests that could be substantially affected by the outcome of this proceeding."

III.

Movants would show this Court that the impartiality of this judge might reasonably be questioned, or that the judge may appear to be less than impartial for the following reasons:

(a) Movants believe that this Court has either initiated or considered numerous ex parte communications with counsel for the Brownings and/or Fairway Land Company, *et al.* concerning the proceedings pending before him;

(b) Movants believe and assert that this Court has failed to accord them their full rights to be heard according to law and has entered numerous orders without notice and without a hearing, all of which have been against, and in severe derogation of the rights of Movants;

(c) Movants believe that this Court has in the past been represented by counsel for Fairway Land Company, *et al.* and by counsel for the Brownings and that this Court is being presently represented by counsel for the Brownings, who are in fact, parties in interest in this action. By virtue of present representation, this Court has need to consult with such counsel and has ongoing relations with these parties which may be affected by this Court's rulings in this court;

(d) Movants assert that this Court, in ruling on the Brownings' petition for declaratory relief, over Movants' demand for a jury trial, has summarily denied Movants their fundamental rights to a jury.

(e) This Court has indicated in remarks from the Bench that it has received ex parte communications and that it has accepted as true, or assumes to be true, many of the disputed fact issues in this case.

(f) Movants believe that this Court has made public statements concerning the merits of this case, which evidence prejudgment of facts in dispute.

For the foregoing reasons, Movants assert that the impartiality of this court may reasonably be questioned, and urge that in order to avoid the appearance of impropriety this Court should recuse himself in favor of a Court to be assigned by the presiding judge.

IV.

Movants would show that under Art. 200a and Rule 18, if this Court declines to recuse himself he shall forward to the presiding judge of the administrative judicial district an order of referral, this motion and any pleadings in response thereto and request that the presiding judge hear or assign this motion for hearing upon notice to all parties herein. Movants would further show this Court that this Court should make no further orders and take no further action in this case pending the hearing and disposition of this motion.

WHEREFORE, PREMISES CONSIDERED, Movants pray that upon hearing of this motion, this Court recuse himself, or, in the event that this Court declines to do so, that he make proper request under Rule 18a and Art. 200a and that pending the determination of this motion, he take no further action in this cause.

Respectfully submitted,

/s/ JAMES H. KEAHEY

James H. Keahey
Bar No. 11138000
414 Brady Lane
Austin, Texas 78746
(512) 327-0941

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Recuse was hand delivered to all counsel of record on this 25th day of June, 1982.

/s/ JAMES H. KEAHEY

VERIFICATION

The STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned authority, on this day personally appeared James H. Keahey, who, being by me first duly sworn, did on his oath depose and say Attorney for Movants in the above styled proceedings, and that as such he is authorized to make this affidavit and that he has read the foregoing Motion To Recuse and that the facts stated therein and the allegations therein made are true and correct.

/s/ JAMES H. KEAHEY

SUBSCRIBED AND SWORN TO before me this the 24th day of June, 1982.

/s/ PAT MCKEOWN
Notary Public in and for
Dallas, Dallas County, Texas

My Commission expires:
April 7, 1984

APPENDIX 5

NO. 82-5742-I

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
162ND JUDICIAL DISTRICT

FAIRWAY LAND COMPANY, et al.,

vs.

HUMBLE EXPLORATION COMPANY, INC., et al.,

vs.

JANE H. BROWNING, et al.

SUPPLEMENTAL MOTION TO RECUSE

TO THE HONORABLE MORRIS M. ROLSTON:

COME NOW Humble Exploration Company, Inc., Pat S. Holloway, Holloway Exploration Corporation and Sterling Pipeline Company (hereinafter "Movants") and having previously filed herein their Motion to Recuse, which motion has been set for hearing, file this their Supplemental Motion to Recuse, and would show this Court additional grounds for granting the relief requested in the Motion to Recuse, as set forth following:

I.

In addition to those reasons set forth in paragraph III of the Motion to Recuse, Movants would show this court that the impartiality of the Honorable Dee Brown Walker might reasonably be questioned, or that he may appear to be less than impartial for the following reasons:

(a) Movants believe and assert that this court has acted in such a manner as could reasonably be believed to evidence a bias in favor of both the Plaintiffs and the Browning Interests, and counsel for such parties, and a bias against Movants and their counsel;

(b) Movants believe that this court, in entering various orders without notice and proper hearing and in setting other hearings on an unreasonably accelerated basis, has denied Movants due process under the state and federal constitution.

WHEREFORE, PREMISES CONSIDERED, Movants pray that the relief requested in their Motion to Recuse be in all things granted.

Respectfully submitted,

/s/ JAMES H. KEAHEY
James H. Keahey
Bar No. 11138000
414 Brady Lane
Austin, Texas 78746
(512) 327-0941

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Supplemental Motion to Recuse was hand delivered to all counsel of record on this 1st day of July, 1982.

/s/ JAMES H. KEAHEY
James H. Keahey

VERIFICATION

The STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned authority, on this day personally appeared James H. Keahey, who, being by me first duly sworn, did on his oath depose and say that he is the Attorney for Movants in the above-styled proceedings, and that as such he is authorized to make this affidavit and that he has read the foregoing Supplemental Motion To Recuse and that the facts stated therein and the allegations therein made are true and correct.

/s/ JAMES H. KEAHEY
James H. Keahey

SUBSCRIBED AND SWORN TO BEFORE ME this the 30th day of June, 1982.

/s/ KAY HANKS
Notary Public in and for
the State of Texas

My Commission Expires:
1-25-86

KAY HANKS
Printed Name of Notary